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Supreme Court, U.S.
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No. 89-1315

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1989

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, Individually and d/b/a GWINNETT AMBULANCE SERVICES,
Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether Official Code of Georgia Annotated Section 51-12-5 (1982), which authorizes punitive damages to be awarded in tort actions "in which there are aggravating circumstances, in either the act or the intention," violates the Due Process Clause of the Fourteenth Amendment, in that, among other things:

(a) It fails to provide adequate notice of the conduct for which punitive damages may be allowed;

(b) It fails to set forth any clear, constitutionally acceptable standards for juries to apply in determining whether to award punitive damages; and

(c) By leaving the determination of the amount of punitive damages solely to the jury, in its "enlightened conscience," it fails to set forth any clear, constitutionally acceptable standards for juries to apply in determining the amount of such damages.

(2) Whether Official Code of Georgia Annotated Section 51-12-5 (1982), which authorizes punitive damages to be awarded in tort actions, violates the Equal Protection

Clause of the Fourteenth Amendment, in that it fails to protect defendants subject to punitive damages in civil cases in a manner constitutionally consistent with the protections provided under the criminal laws to criminal defendants (*e.g.*, notice of the prohibited conduct, proof beyond a reasonable doubt, upper limit of criminal fine specified by law, protection against double jeopardy).*

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*All parties to this case are named in the caption except Metro Ambulance Services, Inc. Metro Ambulance Services, Inc., paid $10,001.00 into the registry of the trial court and did not appeal to the Supreme Court of Georgia from the trial court's judgment. It, therefore, has no interest in the outcome of this petition. Metro Ambulance Services, Inc., has, however, been given notice pursuant to Rule 19.6. Because 28 U.S.C. § 2403(b) may be applicable to this case, the Attorney General of Georgia has been served with copies of this Petition.

Pursuant to Rule 28.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of petitioner: the Gwinnett Hospital System Foundation, Inc., and its subsidiary, Gwinnett Service Corporation, Inc.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, the Hospital Authority of Gwinnett County, Georgia, individually, and d/b/a Gwinnett Ambulance Services, respectfully petitions the Court for writ of certiorari to review the judgment and opinion of the Supreme Court of Georgia entered in this case on November 22, 1989 (as revised) (reconsideration denied, December 20, 1989), upholding Georgia's punitive damages statute.

Opinions Below

The opinion of the Supreme Court of Georgia, as revised, is reported at 259 Ga. 759, 386 S.E.2d 120 (1989), and is reproduced in the Appendix, *infra*, beginning at A-1. The order denying reconsideration appears in the Appendix, *infra*, at A-13. The judgment of the Superior Court of Cobb County dated September 27, 1988, is unreported but is reproduced in the Appendix, *infra*, at A-14.

Jurisdictional Statement

The judgment and opinion sought to be reviewed was originally rendered by the Supreme Court of Georgia on November 22, 1989. That Court subsequently revised its opinion and denied petitioner's motion for rehearing on December 20, 1989.

Jurisdiction to review the decision of the Supreme Court of Georgia by writ of certiorari is conferred upon this Court pursuant to 28 U.S.C. § 1257(a). This petition for writ of certiorari is filed within ninety days of the denial of petitioner's motion for reconsideration by the Supreme Court of Georgia, as allowed under 28 U.S.C. § 2101(c), (f), and Rule 20 of the Supreme Court Rules.

Constitutional and Statutory Provisions Involved

This suit challenges the constitutionality of Section 51-12-5 of the Official Code of Georgia Annotated (1982) (O.C.G.A.) which provided, at all times pertinent to this appeal, as follows:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

In addition to the above, this case involves the Due Process Clause of the Fourteenth Amendment to the Constitution, which provides in pertinent part as follows:

> [N]or shall any state deprive any person of . . . property, without due process of law . . . .

In addition, this case involves the Equal Protection Clause of the Fourteenth Amendment, which provides in pertinent part as follows:

> [N]or [shall any state] deny to any person within its jurisdiction the equal protection of the law.

Statement of the Case

1. *Summary of the Case.*

Petitioner seeks review on writ of certiorari of its contention that a judgment imposing $1,300,000.00 in punitive damages pursuant to O.C.G.A. § 51-12-5, *supra*, accompanied only by "nominal" damages ($5,001.00, levied jointly against petitioner and a co-defendant), has deprived and will deprive petitioner of substantial rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The constitutional issues sought to be reviewed are special and important and present questions briefed and argued before this Court, but not decided, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, U.S. , 109 S.Ct. 2909, 106 L.Ed. 2d 209, (1989).

The constitutionality of the Georgia statute governing punitive damages was properly raised in the courts of Georgia and was expressly reviewed and considered by the Supreme Court of Georgia in the decision below (Appendix at A-1, A-6-12). In that decision, the Court

below upheld the Georgia statute in the face of petitioner's challenges to its constitutionality.

2. *Presentation of Issues in the State Court.*

Petitioner's constitutional arguments were raised throughout the course of this case, beginning in the trial court as early as in its amendment to answer and defenses (R.60-64, set forth in the Appendix, *infra*, at A-16). Petitioner's pre-trial motion to dismiss or strike plaintiff's claim for punitive damages on the constitutional grounds (A-20) was overruled by the trial court (A-24). Nevertheless, petitioner incorporated all of its constitutional arguments when it moved for directed verdict at trial (A-26), and, in addition, objected to all the court's jury charges as to punitive damages (A-29). Petitioner also specifically raised its constitutional arguments in its motion for judgment notwithstanding the verdict or for new trial (A-30), which the trial court, consistent with its earlier rulings but with the amounts of the verdict then known, overruled (A-35).

Petitioner's appeal to the Supreme Court of Georgia enumerated as error that Georgia's punitive damages statute, O.C.G.A. § 51-12-5, *supra*, was unconstitutional as a denial of due process of law and equal protection of the law under the U. S. Constitution (A-37). The Supreme Court of Georgia in its opinion issued November 22, 1989, specifically confronted the issue of whether the Georgia statute was constitutional under the Equal Protection and Due Process Clauses of the state and federal constitutions and upheld the statute as constitutional. *See Hospital Authority of Gwinnett County v. Jones*, *supra* (A-6-12).

The constitutionality of the Georgia statute under the Due Process and Equal Protection Clauses was, as demonstrated above, raised in the trial court in petitioner's defensive pleadings, by motion to dismiss and strike, by motion for directed verdict, by objections to the charge to the jury, and by motion for judgment notwith-

standing the verdict. The constitutional issues were also recognized and determined by the highest court of the state in its opinion in this case.

The federal question was, therefore, timely and properly raised so as to give this Court jurisdiction to review the judgment below.

3. *Material Facts.*

The facts material to this case, including those relied upon by the Georgia Supreme Court, are as follows:

On May 20, 1985, William Harold O'Kelley was severely burned over 70% of his body by a fire caused by a head-on collision between his truck and a car which crossed the center line of a road in Gwinnett County, located northeast of Atlanta, Georgia.

Emergency personnel who responded by ambulance to the accident called for a medivac helicopter to transport O'Kelley. The helicopter was owned and operated by co-defendant Metro Ambulance Services, Inc., a separate corporation.

The Senior Advanced EMT in charge at the scene, Ms. Beth Burgess, was an employee of Gwinnett Ambulance Services, operated by the Hospital Authority of Gwinnett County (hereinafter "the Hospital Authority"). Ms. Burgess had Mr. O'Kelley placed in the ambulance, where she examined his burns. After she attempted unsuccessfully to begin an IV, she decided to transport Mr. O'Kelley to Joan Glancy Hospital, one of the hospitals operated by the Hospital Authority (T.317-318).

Also, while the helicopter was en route to the accident site, the supervisor of Gwinnett Ambulance Services directed the emergency technicians at the scene to transport the patient to Joan Glancy Hospital, which was less than 2 miles from the accident scene (T.15), and had on staff two physicians with significant training and experience in treating burn patients. One of these physicians, Dr. Gaskins, who was monitoring EMT radio transmis-

sions, agreed with the decision to transport the patient to Joan Glancy (T.549). The helicopter was about 2 to 3 minutes away when the ambulance left the scene. The trip to the hospital by ambulance took about 4 minutes (T.81, 91).

The co-defendant's helicopter was also diverted to Joan Glancy Hospital, where it landed safely in the parking lot and where the pilot had ample time to familiarize himself with the area.

Plaintiff introduced the testimony of a Gwinnett Fire Department dispatcher, who was on duty dispatching ambulances at the time of the accident, who related the facts of instances when an emergency patient was not taken to the nearest hospital (as was done here) but instead to one of the Hospital Authority's institutions. He further testified that the reason for this policy was to "provide more services to the county."

At the hospital emergency room the patient was treated and stabilized by Drs. Gaskins and Mason (the two experienced physicians referred to above), by the establishment of IV lines which the EMT had been unsuccessful in starting in the ambulance, administration of morphine, and placement of a respiratory tube in the patient's burned throat after he complained of shortness of breath about an hour after reaching the hospital.

Due to the severity of his injuries, the patient's chances of survival were about 1%. After being examined and x-rayed for the possibility of other injuries, about an hour and a half after arriving O'Kelley was strapped into a stretcher and loaded onto the co-defendant's helicopter for evacuation to Humana Hospital in Augusta, Georgia, which has a "burn unit" which specializes in treating severely burned patients.

On lift-off from the hospital parking lot, the co-defendant's helicopter hit a light pole and crashed. Experts testified at trial that the accident was caused by gross pilot error, not only for flying into the pole, but also

because the water-alcohol tank, which may have been necessary to give added power to the helicopter engine for the assent from such a confined space, was empty.

Incredibly, though the pilot and another occupant of the helicopter were killed, O'Kelley was only slightly injured, if at all, in the helicopter crash. After being re-examined at Joan Glancy Emergency Room, O'Kelley was then transported by ambulance to Grady Hospital, in Atlanta, where he died six days later as a result of his extensive burns. The bill for services from Joan Glancy Hospital was $1,216.26.

The Administrator of O'Kelley's estate sued Metro Ambulance Services, Inc., and the Hospital Authority, in its own capacity and as the operator of Gwinnett Ambulance Services, for nominal and punitive damages allegedly caused by the negligent acts of their employees. No claim to actual damages for personal injury or wrongful death was asserted. The driver of the car which caused the head-on collision, and her employing companies, were also sued in a separate suit (A-2, n.3).

Plaintiff's counsel contended that punitive damages were warranted because the Hospital Authority allegedly was motivated by profit, rather than patient care, in taking Mr. O'Kelley to one of its hospitals, and the Hospital Authority failed to maintain a proper helicopter landing area. (The Court below, however, observed that generally punitive damages are not authorized for non-performance of a duty and did not base its decision on the alleged failure to provide a proper landing area; A-5, n.7).

The jury awarded O'Kelley's estate nominal damages of $5,001.00 against the Hospital Authority and Metro Ambulance Services, Inc., jointly, and punitive damages of $1,300,000.00 against the Hospital Authority, and $5,000.00 in punitive damages against Metro Ambulance Services, Inc. (As noted above, Metro did not appeal the awards entered against it.)

The trial court ordered that the verdict of the jury be made the judgment of the Court on September 27, 1988, and further ordered that the plaintiff recover pre-judgment interest on the damages awarded in the amount of $60,000.00 from the Hospital Authority (A-14-15). On October 7, 1988, the Hospital Authority's filed its motion for judgment notwithstanding the verdict or, in the alternative, for new trial (A-30), which was denied on January 19, 1989 (A-35).

Petitioner appealed to the Supreme Court of Georgia from the Judgment entered on September 27, 1988, and from the Order entered on January 19, 1989, enumerating error on the constitutional issues previously raised (A-37), and the Supreme Court issued its original opinion on November 22, 1989 (rehearing denied, December 20, 1989). This petition for certiorari followed.

Argument: Reasons for Granting the Writ

Before considering the applicability of the Due Process and Equal Protection Clauses, a brief analysis of the statute here in issue is warranted. O.C.G.A. § 51-12-5 authorizes punitive damages in a tort action of any type, and was the only statutory authority for general punitive damages in Georgia at the time of Mr. O'Kelley's accident.[1] It provides as follows:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrong-

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[1]The Georgia law regarding punitive damages was amended, effective July 1, 1987, to add a new statute governing punitive damages. O.C.G.A. § 51-12-5.1 now governs punitive damages in all causes of action occurring after July 1, 1987. The new statute places a "cap" on punitive damages in some cases, requires proof by "clear and convincing" evidence, and effects certain other changes in the law, as well. O.C.G.A. § 51-12-5 continues to apply to all causes of action arising prior to July 1, 1987. Moreover, the code section in issue in this case, O.C.G.A. § 51-12-5, is similar to the laws and court decisions of numerous other states, as shown below.

> doer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

Thus, under this statute, a jury is authorized to award punitive damages in any tort case in which there are "aggravating circumstances, in either the act or the intention." Recognizing that the phrase "aggravating circumstances, in either the act or the intention" is vague and indefinite and provides virtually no guidance for determining the type of conduct described, the Georgia courts have, in effect, defined "aggravating circumstances" as willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to the consequences. *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 148-149, 45 S.E. 1000 (1903); *Kaplan v. Sanders*, 237 Ga. 132, 134, 227 S.E.2d 38, 39 (1976); *General Refractories Co. v. Rogers*, 240 Ga. 228, 230, 239 S.E.2d 795, 798 (1977). *See also* A-4.

However, these additional words are themselves vague and indefinite and provide very little guidance as to the conduct prohibited. By comparison, in a tort suit based upon fraud, the trial judge would be required to define "fraud" with specificity for the jury. Similarly, in suits involving alleged willful misconduct, malice, or wantonness, in other contexts, those terms could not be considered to be self-explanatory, but would require further clarification.[2] No such clarification of punitive damages appears in Georgia law, either O.C.G.A. § 51-12-5 or O.C.G.A. § 51-12-5.1.

Moreover, the clarity and specificity of the words and phrases used to define "aggravating circumstances" is to be measured by the least clear and least specific of such words and phrases. The phrase "that entire want of care

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[2]For example, " 'Malice,' as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings." *Smith v. Wade*, 461 U.S. 30, 39 fn. 8 (1983). The passage of time has not clarified the definition of malice.

which would raise the presumption of a conscious indifference to consequences" is most unclear and indefinite, if not meaningless, to a jury. It was that supposedly clarifying expression which was directly involved here, as demonstrated by the trial court's charge to the jury.[3]

Unlike the words "willful misconduct," which connote some intentional affirmative, yet unacceptable act, the words "entire want of care" may connote nothing more than a failure to act, which failure may be a general failure to take any action to prevent an occurrence (an "across the board" failure to act, so to speak), or may be a failure to take any action to prevent the particular cause of an occurrence (a complete, yet particularized, failure to act). Neither the statute nor the cases resolves this ambiguity.

According to a recent review of state law in 2 L. Schlueter and K. Redden, *Punitive Damages* Ch. 18, 167 et seq. (2d ed. 1989), the following states have punitive damage laws or rules similar to Georgia's O.C.G.A. § 51-12-5, in that they do not prescribe with certainty the conduct for which punitive damages may be allowed, and do not inform judges and juries of the nature of such conduct:

Alaska: "outrageous" conduct, meaning "done maliciously or with bad motives, or done in reckless disregard for the interests of another";

Arizona: penalty for "evil minded conduct," defined as (1) evil actions, (2) malicious motives, or (3) outra-

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[3]The trial court charged the jury, in pertinent part, as follows:

"Now, it is not essential to recover for punitive damages that the person inflicting the damage was guilty of willful and intentional misconduct. It is sufficient that the act be done under such circumstances as evidences an entire want of care and conscious indifference to the consequences." The complete explanation of the court regarding punitive damages is set forth in the Appendix, *infra*, at A-27-28.

geous, intolerable or oppressive conduct that results in a high risk of great harm to others;

Arkansas: imposed when defendant acts "maliciously or willfully, and wantonly acts in reckless disregard of the rights and safety of another";

Colorado: "fraud, malice, insult, or a wanton and reckless disregard of the plaintiff's rights and feelings";

Connecticut: purpose only to compensate plaintiff, not to punish defendant; but standard is "malicious or wanton, or at least in reckless disregard of the consequences that the defendant knew or should have known would result";

Delaware: "wanton or malicious, including ill will, hatred, spite or a conscious desire to injure the plaintiff"; also includes gross negligence if deemed "willful and malicious";

Florida: "willful, wanton, or gross misconduct";

Hawaii: authorized if defendant acts "willfully and wantonly, oppressively or with such malice that indicates a reckless indifference to the consequences of his acts";

Idaho: where there is evidence of "wanton, malicious, or gross misconduct, or where malice or oppression may be implied from the facts";

Illinois: wrongful act accompanied by "willful, wanton, malicious or oppressive" conduct;

Indiana: "malicious, oppressive or grossly fraudulent", malice implied by "wrongful acts done in reckless disregard of plaintiff's rights or characterized as abusive and willful";

Iowa: malice, fraud, oppression; "legal malice" may suffice, i.e., may be inferred if act was "illegal or

improper and done willfully and wantonly in reckless disregard of the rights of others";

Kansas: "malice, fraud, gross negligence or oppression";

Kentucky: "malicious, wanton, or in reckless disregard for the rights of the plaintiff";

Maine: "malice, fraud, insult, or wanton and reckless disregard of the plaintiff's rights", generally requires actual malice, except in libel cases;

Maryland: standard in "pure tort" action is either "actual malice or implied malice from tortious conduct characterized as intentional, wanton and without legal excuse";

Michigan: awarded only to compensate plaintiff, but standard is "wanton, willful, malicious, oppressive, grossly negligent, or in reckless disregard of the rights or safety of the plaintiff";

Minnesota: "maliciously, willfully or recklessly indifferent to rights of plaintiff", actual or implied malice required;

Mississippi: "unlawful, malicious, wanton and reckless", "gross negligence that is equivalent to willful and wanton mischief";

Missouri: actual malice not required, but plaintiff must show at least legal malice evidenced by some element of wantonness or evil motive;

Montana: "malicious, wanton, or oppressive acts which indicate a reckless disregard for the plaintiff's rights";

Nevada: where "wrongful intent is shown through an act of malice";

New Jersey: "actual malice" which is "intentional misconduct or evil-minded act", or if misconduct is involved, "wanton and willful indifference to the rights of another with knowledge of high probability of harm";

New Mexico: "malicious, oppressive, fraudulent, or a reckless or wanton disregard of the rights of others";

New York: "aggravating circumstances" such as "malice, oppression, fraud or a willful or reckless disregard of the plaintiff's rights";

North Carolina: where wrong is done "willfully or under circumstances of rudeness, oppression, or in a manner evidencing a reckless and wanton disregard of the plaintiff's rights";

North Dakota: where defendant acts "oppressively, fraudulently, or with actual or implied malice";

Ohio: "malice, aggravated or egregious fraud, oppression or insult";

Oklahoma: if defendant acts "oppressively, fraudulently, or maliciously"; evil intent, actual or implied, required; "gross negligence, or a willful and wanton disregard of another's rights" will also suffice;

Oregon: if defendant acts "maliciously, willfully, and wantonly, or with a reckless disregard of the rights of others";

Pennsylvania: if tort committed "maliciously, willfully, or so recklessly that a wanton disregard of the plaintiff's rights is indicated";

Rhode Island: "maliciously, willfully, recklessly, or in bad faith";

South Carolina: "wanton, willful or malicious";

South Dakota: "oppression, fraud, malice, actual or presumed";

Tennessee: "aggravated, such as willfully and maliciously done or as a wanton and reckless disregard of plaintiff's rights";

Texas: "fraud, malice or gross negligence";

Utah: "intentional, willful, and malicious conduct" or "reckless disregard of the plaintiff's rights evidencing a wrongful motive";

Vermont: "fraud, malice, gross negligence, or oppression";

Virginia: "aggravating circumstances such as fraud, oppression or malice which may be inferred from circumstances evidencing a willful disregard for the rights of others";

West Virginia: "wrongful act is intentional or where facts lead to an inference of malice or a wanton disregard of the plaintiff's rights";

Wisconsin: "bad intent, malice or reckless disregard of the consequences";

Wyoming: "maliciously, willfully, or wantonly"; and

District of Columbia: "intentional behavior that aggravates the injury such as fraud, oppression, recklessness, or a willful disregard of the plaintiff's rights".

According to the review by Schlueter and Redden, *Punitive Damages, supra,* the laws in at least the following states are similar to O.C.G.A. § 51-12-5 in that the amount of punitive damages is unlimited and is left to the jury's discretion, without meaningful guidelines: *Alaska; Arizona* (amount must bear reasonable relationship to amount of actual damages awarded); *Arkansas* (must be reasonable in proportion to actual damages awarded); *Delaware* (must not be disproportionate to compensatory damages); *Hawaii; Idaho; Indiana; Iowa* (must be a reasonable relationship between punitive and actual damages); *Kansas; Kentucky* (punitive damages must bear reasonable relationship to the injury and cause); *Maine; Michigan; Minnesota; Mississippi; Missouri* (must bear reasonable relationship to injury); *Montana; Nevada; New Jersey* (reasonable relationship to harm and cause of harm); *New York; North Carolina; Oregon; Pennsylvania* (reasonable relationship to actual damages); *Rhode Is-*

land; South Carolina; South Dakota; Tennessee; Utah (reasonable relationship between punitive and actual damages; reasonably proportionate to nature of misconduct and extent of injury); and *Vermont.*

According to Schlueter and Redden, *Punitive Damages, supra*, a few states, unlike O.C.G.A. § 51-12-5, require a higher burden of proof than the preponderance of the evidence: *Arizona* (clear and convincing); *Colorado* (beyond a reasonable doubt); *Florida* (clear and convincing); *Minnesota* (clear and convincing); *North Dakota* (clear and convincing); *Ohio* (clear and convincing); *Oklahoma* (clear and convincing); and *Oregon* (clear and convincing). Although the trend appears to be to raise the standard, e.g. O.C.G.A. § 51-12-5.1, *supra*, at n.1, other states, like Georgia's O.C.G.A. § 51-12-5, apparently continue to rely on the traditionally lower standard, the preponderance of the evidence.

The states, identified above, at a minimum, need the guidance of this Court as to the issues raised here.

We turn now to the requirements of the Fourteenth Amendment applicable to Georgia's punitive damages statute.

1. The Punitive Damages Statute Denies Defendants Due Process of Law.

Damages and penalties imposed by state laws, including civil laws, may be invalid as deprivations of property without due process of law. *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915).[4]

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[4]In *Missouri Pac. v. Tucker, supra*, the Court set aside a $500 penalty as arbitrary and oppressive.

The punitive damages statute applied in this case, O.C.G.A. § 51-12-5, *supra*, like the laws in numerous other states, violates the Due Process Clause in each of the following specific ways, among others:

(a) It fails, as do the court decisions interpreting it, to notify people (who are later to become defendants) of the nature of the offenses for which they may be liable in punitive damages, and it fails to limit the award of punitive damages to criminal, or even intentional, behavior;

(b) It likewise fails, as do the court decisions interpreting it, to guide judges and juries with regard to the nature of the offenses for which punitive damages may be awarded;

(c) It fails, as do the court decisions interpreting it, to inform judges and juries as to any means of calculating or determining the amount of punitive damages to be awarded, whether by reference to actual damages or otherwise, leaving such determination to "the enlightened conscience" of the jury;

(d) It fails to place any ascertainable or meaningful limit upon the amount of punitive damages to be awarded;

(e) It permits awards of excessive punitive damages without relationship to the public safety, health, or welfare sought to be served by the allowance of punitive damages; *i.e.*, the statute permits "overkill" ("overdeterrence") far beyond the state's police power requirements;

(f) It allows punitive damages to be awarded upon proof by a mere preponderance of the evidence, despite the punitive and at least quasi-criminal nature of such awards, contrary to the requirements of due process of law; and

(g) It allows persons to be put in jeopardy of repeatedly paying punitive damages for the same conduct or offense.

Considered separately and cumulatively, the foregoing statutory failures render O.C.G.A. § 51-12-5 invalid as a denial of due process.

As this Court noted in *Musser v. Utah*, 333 U.S. 95, 97 (1948): "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *See also Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964).

Although the foregoing decisions involved criminal laws, the due process requirement of reasonable certainty in fixing a standard of obedience in advance applies to civil as well as criminal legislation. *Cline v. Frink Dairy Co., supra*, 274 U.S. at 463, citing *Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 238 (1925).[5]

So too, vague penalty provisions pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given statute. *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *United States v. Evans*, 333 U.S. 483 (1948). Certainly, then, a law which fails to inform judges and juries as to the proper means of calculating or determining the amount of punitive damages to be awarded (whether by reference to the actual or compensatory damages incurred, the defendant's ability to pay, or some other measure of damages),[6] and which

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[5]A state law which deprives a person of property without due process of law would violate the Due Process Clause whether that state law be criminal, or civil, or hybrid. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

[6]In Georgia, the "measure" of punitive damages is "the enlightened conscience of an impartial jury." *Head v. John Deere Plow Co.*, 71 Ga.

fails to inform judges and juries as to the maximum punitive damages which may be imposed,[7] is a violation of due process.

In our constitutional criminal procedure jurisprudence, the prohibition against double jeopardy is fundamental. *Benton v. Maryland*, 395 U.S. 784, 794-796 (1969). So too, due process should prohibit a person from being required to pay punitive damages more than once for the same act, such as manufacturers of defective products may be required to do, such as defendants in mass tort situations may be required to do, and such as the Hospital Authority of Gwinnett County might have been required to do if additional suits were brought by, for example, the owner of the helicopter which crashed, or the helicopter pilot. (Such a suit was brought on behalf of the passenger in the helicopter, an EMT on board to care for the patient.)

Furthermore, the award of punitive damages against the Hospital Authority was determined by a mere preponderance of the evidence (A-27), while due process requires that a violator's guilt under the criminal law be proven beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364 (1970). Where the law places no upper limit on liability and where civil defendants can be held liable for prohibitive amounts as punitive damages, the standard of proof required by due process should be greater than a mere preponderance. *See Santosky v. Kramer*, 455 U.S. 745 (1982); *Woodby v. Immigration and Naturalization Services*, 385 U.S. 276 (1966); *see also Addington v. Texas*, 441 U.S. 418 (1979).

App. 276, 279, 30 S.E.2d 662, 664 (1944). This was the "measure" of damages presented to the jury in the instant case in the charge. (A-27)

[7]In Georgia, the only applicable statutory limit on punitive damages is that such damages may not be "so excessive as to justify the inference of gross mistake or undue bias." O.C.G.A. § 51-12-12 (1982). *But see Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988), *infra*.

The court below has recognized that "Our cases on punitive damages do not present clear guidelines to follow . . . ." *General Refractories Co. v. Rogers, supra*, 240 Ga. at 233-234, 239 S.E.2d at 800. A majority of this Court has noted that the standards on which punitive damages are based may be (as they are in Georgia) "ill-defined." Justice Brennan in his dissent in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n. 4 (1985), joined by Justices Marshall, Blackmon and Stevens, quoting then Justice Rehnquist's dissent in *Smith v. Wade*, 461 U.S. 30, 59 (1983).

The statute here in issue fails to set forth any meaningful standard or criterion for the jury to apply in determining whether or not to award punitive damages, and if so, the amount. It leaves to the unbridled discretion of a random jury what to give and whether to give it.

Each award of punitive damages, therefore, represents not a governmental decision but an award that speaks to the conscience of a particular jury with no uniformity, thus permitting awards under the same or similar circumstances to vary widely and wildly in amount, according to the arbitrary motion, and potential prejudice, of one particular group of people. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("Consequently, juries assess punitive damages in wholly unpredictable amounts . . . ."); *Smith v. Wade, supra*, 461 U.S. at 59 (Rehnquist, J. dissenting) ("punitive damages are frequently based upon the caprice and prejudice of the jurors."); and *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979) ("[T]he impact of these windfall recoveries is unpredictable and potentially substantial").[8]

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[8]"Moreover, because such damages [non-economic damages, such as mental anguish and punitive damages] are essentially subjective, awards for similar injuries can vary immensely from case to case, leading to highly inequitable, lottery-like results." Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications

"Unpredictable" hardly describes the difference in result between the Hospital Authority ($1.3 million in punitive damages) and Metro Ambulance Services ($5,000 in punitive damages), whose pilot was guilty of "gross pilot error" (A-2).

Punitive damages as allowed by O.C.G.A. § 51-12-5, *supra*, are inconsistent in every respect with the requirements of due process, substantive and procedural. That statute, and others like it, has permitted and will permit the arbitrary confiscation and transfer of property to plaintiffs like Mr. O'Kelley's estate, far in excess of the deceased's other damages ($5,001 in this case), without advance notice of the conduct to be avoided, pursuant to a vague and indefinite statute which does not give notice of the conduct to be penalized.

Punitive damages were awarded here under a statute which does not limit the penalty to be imposed, and which allows an award to be made upon a mere preponderance of the evidence, based upon the whim and caprice of a jury left to its own devices without meaningful guidelines, legislative or judicial. Under these circumstances, "The plaintiff's position is analogous to that of the prosecuting attorney whose pay is determined by the number of convictions he is able to secure." Morris, "Punitive Damages in Tort Cases", XLIV Harv. L. Rev. 1173 (1931). A prosecuting attorney's salary, however, pales in comparison to the potential pay-off to a successful plaintiff with a punitive damages claim.

In this case, plaintiff's punitive damage award is 260 times his nominal damages. Regarding this disparity, the court below held: "That this award appears to bear no rational relationship to the extent of the injury is of no consequence" (A-5).

In the recent decision in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), the Court recognized, but did not

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of the Current Crisis in Insurance Availability and Affordability, p. 66 (1986) (matter in brackets added).

reach, the substantial nature of the due process issue raised here, saying (475 U.S. at 828-829:

> Appellant also argues . . . that lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment . . . . These arguments raise important issues which, in an appropriate setting, must be resolved . . . .

In the even more recent decision in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court had noted probable jurisdiction in a case apparently involving the due process issue but was not able to reach this issue. Nevertheless, in a concurring opinion, Justice O'Connor noted that, in an appropriate case, "the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits."

Finally, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, U.S. , 109 S.Ct. 2909, 106 L.Ed 2d 209 (1989), the Court made its most recent pronouncements regarding the constitutionality of punitive damages, but did not reach the issues presented here. Four Justices, however, expressly stated their concerns about the scope of the due process constraints on punitive damage awards to private parties. *See Id.* at 2923, 2924 (Brennan, Marshall, JJ., concurring; O'Connor, Stevens, JJ., concurring).

The case at bar presents these important issues squarely, and in a context with wider application than just the Georgia statute at issue here. Having recognized the importance of the unresolved constitutional issue presented here, we submit that the Court should grant the writ and speak directly to the questions raised in this case.

2. The Punitive Damages Statute Denies Defendants Equal Protection of the Laws.

There can be little argument or debate that the intent and purpose of punitive damages, sometimes called "exemplary" damages, is to punish and penalize the offender, regardless of the name by which such damages are called. That is to say, punitive damages extracted from a civil litigant serve the same purpose as a fine imposed upon a criminal defendant, to-wit: punishment. [9] To say that the purpose of punitive damages is deterrence, not punishment, is to engage in semantics (see A-3, n.5). Deterrence may be the object, but punishment is the means of reaching that object.

As the court below recognized (A-5), punitive damages are "private fines levied by civil juries. . . ", citing *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 350. Regardless of whether such "fines" are "public" or "private," they are "fines". This is particularly so in Georgia where a plurality of the Georgia Supreme Court once found such fines to be subject to Georgia's constitutional prohibition against "excessive fines". Ga. Const. 1983, Art. I, Sec. I, Par. XVII; *Colonial Pipeline Company v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988); but see A-6.

Although not criminal fines within the meaning of the Eighth Amendment, *Browning-Ferris v. Kelco, supra*, punitive damages awarded to private parties nevertheless are fines, at least quasi-criminal in nature, and hence should be treated for equal protection purposes in the same classification, or a class next thereto, as fines imposed in criminal cases.

When viewed in this light, the statute in issue here offends equal protection of the laws because it provides

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[9] Punitive damages ". . . serve the same function as criminal penalties. . . ." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting); *overruled on other grounds, Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

fewer protections for private litigants in tort suits than the criminal law provides to persons accused of crimes. That is to say, comparing defendants in criminal cases liable for fines and defendants in civil cases liable for punitive damages (fines, *Gertz, supra*), the latter are denied equal protection because the former are afforded protections not afforded civil litigants, such as advance notice of the nature of the offenses for which they may be punished, and the consequent certainty that judges and juries will be informed of the nature of the offenses for which such punitive fines may be imposed.

Defendants in criminal cases also have the protection of a statutory limitation upon the amount of fine which may be imposed, and protection against double jeopardy. Moreover, persons charged with crimes may not be convicted unless they are found guilty beyond a reasonable doubt, an important and fundamental protection of the individual against punitive action and a substantially higher burden of proof than a mere preponderance of the evidence. Civil defendants subject to punitive damage awards are denied these and other fundamental protections afforded defendants under the criminal law.[10]

As the Chief Justice noted in his dissenting opinion in *Smith v. Wade, supra*, 461 U.S. at 59, punitive damages are "unaccompanied by the types of safeguards present in criminal proceedings." The denial of these safeguards under an open ended punitive damage statute permits "overkill" ("over deterrence"), is not rationally related to a legitimate state interest (punishment or deterrence), and is offensive to the Constitution.

In sum, the fines imposed as punitive damages in civil cases under Georgia's statute deprive civil defendants of the equal protection of the laws afforded criminal defend-

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[10]To the extent that punitive damages are imposed based upon a defendant's financial status, an additional equal protection violation occurs.

ants, and the statute in issue should be declared unconstitutional for this additional reason.

CONCLUSION

Petitioner's constitutional claims are substantial. It has been punished in an amount vastly out of proportion to the nominal damages it was found to have caused. Its punishment has been imposed, over petitioner's repeated objections and protests, without any of the safeguards or protections that due process and equal protection require.

Petitioner has raised its Fourteenth Amendment challenges to the statute at every meaningful opportunity during this litigation. Because these challenges raise important issues, this Petition for Writ of Certiorari should be granted and this case should be briefed and set for oral argument.

February 16, 1990

Respectfully submitted,

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Decided: November 22, 1989

In the Supreme Court of Georgia

46956. HOSPITAL AUTHORITY OF GWINNETT COUNTY ET AL. v. JONES, ADMR. ET AL.

HUNT, Justice.

This case raises issues regarding punitive damages: whether the award is authorized under the facts of this case, whether the award is excessive, and whether punitive damages are constitutional under the excessive fines, equal protection, and due process clauses of our state and federal constitutions.[1]

On May 20, 1985,[2] William Harold O'Kelley was severely burned over seventy per cent of his body from a fire caused by a head-on collision between his truck and a car in Gwinnett County. Emergency personnel responding to the accident immediately called for a medivac helicopter to evacuate O'Kelley to Grady Hospital's burn unit. While still en route to the accident site, the supervisor of the Gwinnett Hospital Authority's emergency rescue unit, Metro Ambulance Services, Inc., countermanded the unanimous judgment of the emergency technicians at the scene and ordered the patient brought to Joan Glancy Hospital, one of the hospital authority's institutions, even though the helicopter was approaching as the ambulance was leaving with the patient. The helicopter was also diverted to Joan Glancy Hospital.

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[1]None of the parties before us raised the question whether punitive damages are appropriately awarded against a public authority and we express no opinion on this issue. Compare *City of Columbus v. Myszka*, 246 Ga. 571 (4) (272 SE2d 302) (1980) (a municipal corporation is not liable for punitive damages); *MARTA v. Binns*, 252 Ga. 289 (313 SE2d 104) (1984) (a rapid transit authority is liable for punitive damages in its capacity as a self-insurer).

[2]Thus, the 1987 legislative amendments to the damage provisions are not directly applicable. Ga. L. 1987, p. 915.

The Gwinnett Chief of Police, who was the dispatch officer at the time of the accident, related facts of other specific instances when an emergency patient was not taken to the nearest hospital or to a trauma center, but instead to one of the authority's institutions. He further testified that Metro's reason for this policy was to "provide more services to the county."

At the hospital emergency room the patient was stabilized, by the establishment of IV lines which the EMT had been unsuccessful in starting in the ambulance, placement of a respiratory tube in the patient's burned throat after he complained of shortness of breath about an hour after reaching the hospital, and administration of morphine. Due to the severity of his injuries, the patient's chances of survival were about 1%. About an hour and a half after arriving, O'Kelley was strapped into a stretcher and loaded onto the helicopter for evacuation to Humana hospital in Augusta. On lift-off from the hospital parking lot, the helicopter hit a light pole and crashed. Experts testified at trial that the accident was caused by gross pilot error, not only for flying into the pole, but also because the water-alcohol tank, which may have been necessary to give added power to the helicopter engine for the ascent from such a confined space, was empty.

Incredibly, though the pilot and another occupant of the helicopter were killed, O'Kelley was only slightly injured in the helicopter crash. O'Kelley was transported by ambulance to Grady Hospital, where he died six days later as a result of his extensive burns. The bill for services from Joan Glancy Hospital was $1,216.26.

The administrator of O'Kelley's estate sued [3] the Gwinnett Hospital Authority in its own capacity and as the owner of the Gwinnett Ambulance Services doing busi-

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[3]The driver of the other car involved in the accident and her employing companies were also sued, but that aspect of the case is not relevant here.

ness as Metro Ambulance Services, Inc.[4], for the negligent acts of the hospital authority employees.

The jury awarded O'Kelley's estate nominal damages of $5,001.00 against the hospital authority and Metro, and punitive damages of $1,300,000.00 against the Gwinnett Hospital Authority and $5,000.00 against Metro Ambulance Services, Inc. The hospital authority appeals.

1. In its first enumeration of error, the Gwinnett Hospital Authority contends the trial court erred in failing to direct a verdict in its favor on the ground that evidence did not authorize an award of punitive damages. The estate relied on two theories to support its demand for punitive damages: that the hospital authority, motivated by a desire to increase profits rather than by the best interests of its patients, directed emergency patients to its own institutions despite the fact that other hospitals were closer or more suited for the care required by the patient, and that the hospital authority failed to maintain proper emergency helicopter landing areas at its hospitals, specifically Joan Glancy, even though it knew the landings were unsafe and medivac helicopters would occasionally be required to use them.

OCGA § 51-12-5 provides for the award of punitive damages:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.[5]

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[4]Although the hospital authority owned Metro only from 1982 until it sold the service to the county in 1986, it retained the right to direct to which hospital the patients would be taken.

[5]Punitive damages to punish or penalize the defendant, as well as to deter him, are provided for under the revised act. Ga. L. 1987, p. 915.

The courts have consistently required that

> [t]o authorize the imposition of punitive or exemplary damages there must be evidence of wilful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. [Cits.]

Kaplan v. Sanders, 237 Ga. 132, 134 (227 SE2d 38) (1976); *Associated Health Systems v. Jones*, 186 Ga. App. 798 (2) (366 SE2d 147) (1988). The measure of damages, "within the enlightened conscience of a jury," appears to be judicially engrafted onto this code section.[6] *King v. Towns*, 102 Ga. App. 895, 904 (118 SE2d 121) (1960); *Head v. John Deere Plow Co.*, 71 Ga. App. 276, 279 (30 SE2d 662) (1944). See division 5, infra.

There is some evidence in this record to support a finding of aggravated conduct and, therefore, the award of punitive damages. A policy of bypassing emergency care at a nearby hospital or diverting patients from an institution whose specialty would have been beneficial to a patient in order to utilize the authority's own hospitals supports a jury's finding a wanton disregard for the rights, and a conscious indifference to the best interests, of its injured patients. Although the evidence was, to be sure, conflicting, it authorized a determination that the authority's decision was made on an economic, rather

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[6]This test must have been adopted from OCGA § 51-12-6: where "the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened conscience of impartial jurors." Under this code section, however, "evidence of the worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed" by the jury, with the express proviso that "the verdict should not be disturbed unless the court suspects bias or prejudice from its excess or its inadequacy." Under OCGA § 51-12-5, such evidence is excluded. *Bob Maddox Dodge, Inc. v. McKie*, 155 Ga. App. 263 (3), (270 SE2d 690) (1980); *Hodges v. Youmans*, 129 Ga. App. 481, 486 (200 SE2d 157) (1973).

than a medical, basis. Therefore, because the jury could decide that the patient's slight injuries in the helicopter incident would not have occurred but for the emergency care policy, the award of nominal damages was authorized and it was not inappropriate that the jury act to deter such conduct through the use of punitive damages under OCGA § 51-12-5.[7] *Woodbury v. Whitmire*, 246 Ga. 349, 351 (271 SE2d 491) (1980).

2. The award in this case is not, as a matter of law, excessive. See division 5, infra. That this award appears to bear no rational relationship to the extent of the injury is of no consequence.[8] "[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 US 323, 350 (94 SC 2997, 41 LE2d 789) (1974). The concept of proportionality as a *legal* limitation on the amount of punitive damages applies, in Georgia, only when such damages are given to compensate for wounded feelings. A deterrence award is based on factors, for the most part, unrelated to the injury to any particular victim, and is limited only by the collective conscience of the jury. *Smith v. Milikin*, 247 Ga. 369 (3) (276 SE2d 35) (1981); *King v. Towns*, supra, 102 Ga. App. at 904; *Davis v. Glaze*, 182 Ga. App. 18, 23 (354 SE2d 845) (1987); *Lang v. Hopkins*, 10 Ga. 37 (3) (1851); OCGA § 51-12-12. Compare *Jones v. Spindel*, 122 Ga. App. 390, 394 (177 SE2d 187) (1970). However, while in deterrence cases

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[7]Because punitive damages are supportable on the theory that the authority acted in conscious disregard of its patients' rights by diverting them to its own institutions, we need not address whether the failure to maintain an adequate heliport at Joan Glancy Hospital might also support the award. However, "[i]t is the general rule that the mere nonperformance of a duty, even though it be one required by law, will not authorize the recovery of punitive damages." *Kaplan v. Sanders*, supra, 237 Ga. at 133-134.

[8]The plaintiffs in this case sought no actual damages for injuries, including pain and suffering, or for wrongful death.

there is no fixed rule regarding a relationship between the award of punitive and actual damages, a court may always consider that fact in questioning the excessiveness of the verdict.[9] E.g., *Colonial Pipeline v. Brown*, 258 Ga. 115, 123 (365 SE2d 827) (1988) (plurality opinion).

3. There is no merit to the hospital authority's contention that an award of punitive damages violates the excessive fines clause of the Eighth Amendment to the United States Constitution. *Browning-Ferris Industries of Vermont, Inc. v. Kelso,* US , (57 USLW 4985, decided June 26, 1989). Nor, under the facts of this case, do we find a violation of the excessive fines clause of our Georgia Constitution, Art. I, Sec. I. Par. XVII. Compare, *Colonial Pipeline Co. v. Brown*, supra, 258 Ga. at (4).

4. Neither the lower standard for liability, the absence of certain protections available to criminal defendants, nor the lack of a ceiling on the amount of punitive damages that can be awarded, results in a denial of equal protection to civil, as compared to criminal, defendants. Because no fundamental rights or suspect classes are involved, these classifications pass the rational basis test under minimal scrutiny. *Colonial Pipeline Co. v. Brown*, supra, 258 Ga. at 124 (Clark, P.J., dissenting).

5. The hospital authority contends that OCGA § 51-12-5, supra, violates due process in that its notice as to the proscribed conduct is unconstitutionally vague and in that its measure of damages, based solely on the "enlightened conscience of the jury," permits verdicts which may be arbitrary and oppressive and yet not subject to limitation by appropriate procedural safeguards.

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[9]An inordinately large deterrence award may be set aside as reflecting undue passion and prejudice rather than an enlightened conscience, *Jones v. Spindel*, supra; OCGA § 51-12-12. We view the language in *Colonial Pipeline*, supra, 258 Ga. at 123, as to the lack of proportionality in this light. We do not see *Colonial* as inconsistent with such cases as *Smith v. Milikin*, supra, 247 Ga. at 372, or *King v. Towns*, supra, 102 Ga. App. at 904.

a. Initially, the hospital authority argues that neither a potential defendant nor a jury can distinguish between a "lack of ordinary care" amounting to negligence and an "entire want of care" entitling a plaintiff to punitive damages. We disagree. Since, under Georgia law, a scienter element which goes beyond even gross negligence is required, e.g., *BLI Construction Co., Inc. v. Debari*, 135 Ga. App. 299, 302 (217 SE2d 426) (1975), the standard of conduct set by OCGA § 51-12-5 is not unconstitutionally vague.

Under proper instruction from the trial court, a jury may distinguish between merely negligent or grossly negligent behavior and the scienter necessary to meet the standard for punitive damages: "wilful misconduct, malice, fraud, wantonness or oppression, or that entire want of care that raises a presumption of a conscious indifference to consequences." As the United States Supreme Court said in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 499-500 (102 SC 1186, 71 LE2d 362) (1982):

> The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. [Footnotes omitted.]

See generally, *Smith v. Wade*, 461 US 30, 46-51 (103 SC 1625, 72 LE2d 632) (1983); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (108 SC 1645, 100 LE2d 62) (1988) (Justice O'Connor concurring in part.)[10]

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[10] "Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate."

b. Punitive damages, like damages for pain and suffering, are decided in this state according to the "enlightened conscience of the jury." The hospital authority contends this standard denies due process in failing to establish any guidelines to channel the broad discretion of the jury.

The right to punitive damages derives from the common-law.[11] See, 1 Callaghan, *Punitive Damages Law and Practice*, § 1.01.[12] Although OCGA § 51-12-5 codifies the right to punitive damages where "there are aggravating circumstances, in either the act or the intention," guidelines for neither the conduct nor the amount of damages are included in the statute. As set out in division 1, supra, the standard for judging the defendant's conduct entitling the plaintiff to punitive damages has been judicially explicated. See also, division 5(a). Likewise, the standard by which the jury assesses damages has been judicially engrafted onto the statute.[13] Historically, the jury's dis-

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[11]"Whether in this case common-law remedies . . . constitute due process of law must turn on an analysis of the competing interests at stake, viewed against the background of "history, reason, [and] the past course of decisions." *Ingraham v. Wright*, 430 US 651, 675 (97 SC 1401, 51 LE2d 711) (1977).

[12]Callaghan points out in his treatise, supra, at § 3.03, p. 3-15:

> thus far, each time a punitive damages statute has been attacked on void-for-vagueness grounds, the argument has been rejected because the courts have found sufficient standards to properly apply the challenged legislation. In addition to the reasons for doing so supplied by the courts, those results may be due, in large measure, to the fact that the statutes amounted to nothing more than a codification of a general common-law rule.

E.g., *Bertero v. National General Corp.*, 529 P2d 608, 625 n.13 (118 Cal. Rptr. 184) (1975).

[13]Since the standard for measuring damages is judicially created, see n. 6, supra, we recommend that trial courts, even under the new statute, see n. 2, supra, consider charging the jury on the factors appropriate to the verdict. Such factors may include: (1) the nature and egregiousness of the defendant's conduct; (2) the extent and duration of the defendant's wrongdoing and the possibility of its recurrence; (3) the intent of the defendant in committing the wrong;

cretion is controlled *by the facts of the case* as evaluated "in the enlightened conscience of the jury." See n. 6, supra. It is important to point out, however, that there are other controls upon the jury's verdict, which have served over the years as a check to the jury's unbridled discretion.

The statutory scheme itself is designed to protect defendants against excessive verdicts. As was said in *Brown v. Service Coach Lines, Inc.*, 71 Ga. App. 437, 444 (31 SE2d 236) (1944):

> [t]he rules of law governing (1) the right of the jury to originally fix the damages, (2) the right of the appellate court to grant a new trial where the verdict is alleged to be excessive or inadequate, and (3) the right of the trial judge to grant a new trial where in his discretion he thinks the verdict 'unfair, unjust, contrary to the evidence, excessive, or too small,' exist apart from and independent of each other.

Trial courts are authorized to set aside arbitrary verdicts under OCGA § 51-12-12:

> The question of damages is one for the jury; and the court should not interfere with the jury's discretion unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias,

or, if requested by a proper motion for new trial under OCGA § 5-5-20, "... when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury." In fact, the rule allowing a trial court to

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(4) the profitability of the defendant's wrongdoing; (5) the amount of actual damages awarded; (6) previous awards of punitive damages against the defendant; (7) potential or prior criminal sanctions against the defendant based upon the same wrongful acts; and (8) any other pertinent circumstances. 1 Callaghan, supra, at § 5.39 (Supp. 1989). Under the new law, Ga. L. 1987, p. 915, evidence of the financial circumstances of the defendant may be admissible.

grant a new trial under OCGA § 5-5-20 is considerably less stringent than under OCGA § 51-12-12:

> When a trial judge orders a new trial on the general grounds in a damage case, this court will presume that his mind and conscience were satisfied that the verdict was unjust in some respect; not merely that he himself, if he had been acting as a juror, would not have fixed upon the amount specified in the verdict. If the judge, had he been upon the jury, could not conscientiously have given acquiescence to the verdict rendered, he is not required to approve it; and we will not control him in refusing to do so. On the other hand, if he can conscientiously acquiesce in the verdict, though it may not exactly accord with his best judgment, or though some other finding might seem somewhat more satisfactory to his mind, and if his sense of justice is reasonably satisfied, he should, in the absence of some material error of law, affecting the trial approve it, and this court will uphold him in so doing.

Holland v. Williams, 3 Ga. App. 636, 638 (60 SE 331) (1907). As was said in *Seaboard Air-Line Ry. Co. v. Benton*, 43 Ga. App. 495, 505 (159 SE 717) (1931),

> [b]efore a verdict becomes final it should, where the losing party requires it by a motion for a new trial, receive the approval of the mind and conscience of the trial judge. He is sometimes spoken of as the thirteenth juror. Until his approval is given, the verdict does not become binding, in a case where a motion for a new trial contains the general grounds.

Thus, under both of these statutes, a trial court has the broad discretionary authority to set aside any judgment it considers excessive and not supported by the evidence.[14]

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[14]Ga. L. 1987, p. 915 reveals an even stronger state policy authorizing trial judges to reduce or reject excessive verdicts not in accordance with the *preponderance of the evidence.*

The appellate courts may also set aside an oppressive jury verdict under OCGA § 51-12-12. Although the statutory standard has been variously described,

> [a]s a general rule, the size of the award for damages in a case such as this is left to the enlightened conscience of impartial jurors, *subject to approval of the trial court. Jones v. Spindel,* 122 Ga. App. 390 (177 SE2d 23) (1970). The appellate court will not disturb the award "absent an award so excessive or inadequate as to shock the judicial conscience." [Emphasis supplied.]

Davis v. Glaze, supra, 182 Ga. App. at 23. Accord, *Smith v. Milikin,* supra, 247 Ga. at 372. While this test admittedly sets a high threshold for an appellate court to upset a jury verdict, that standard is not unlike the "arbitrary and unreasonable" measure for unconstitutionality. E.g., *Barrett v. Hamby,* 235 Ga. 262, 265 (219 SE2d 399) (1975).

We hold that the general standard of review of damages awards set out in OCGA § 51-12-12 and OCGA § 5-5-20 is designed to protect defendants subjected to punitive damages that amount to a deprivation of property. Thus, we conclude the statutory scheme providing for punitive damages does not deny due process for failing to provide adequate procedural safeguards and is not *per se* unconstitutional, but under OCGA § 51-12-12, and, if requested by a motion for new trial under OCGA § 5-5-20, each verdict must be scrutinized to see that it meets the parameters of due process.

In the case before us, the hospital authority moved for a new trial and specifically requested the trial court to review the punitive damages awarded. The trial court declined to set the award aside. We have reviewed the evidence presented in this case and hold, under the circumstances presented, the trial court did not abuse its discretion in refusing to overrule the jury's punitive damage award. Nor, do we find the judgment so excessive

as to be unconstitutional. OCGA § 5-5-20; OCGA § 51-12-12. We affirm.

Judgment affirmed. Clarke, P. J., Smith, J., Gregory, J., Bell, J., and Judge James W. Head concur in the opinion. Marshall, C. J., concurs in the judgment only. Weltner, J., not participating.

SUPREME COURT OF GEORGIA
Atlanta, December 20, 1989

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HOSPITAL AUTHORITY OF GWINNETT COUNTY ET AL. V. R. STANFORD JONES, ADMR., ET AL.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied. Marshall, C.J., Clarke, P.J., Smith, Gregory & Bell, JJ., and J dge James W. Head concur. Weltner, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ JOLINE B. WILLIAMS
Joline B. Williams, Clerk

THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Plaintiff, vs. HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC., Defendants.	CIVIL ACTION 87A-17816-4

JUDGMENT

[Filed September 27, 1988]

The foregoing action having come on regularly for trial by jury before the Court on September 19, 1988, Honorable Harris Adams presiding, and the issues having been duly tried and the parties having presented witnesses and evidence, and the jury having returned a verdict in favor of the Plaintiff and against the Defendants, jointly and severally in the amount of $5,001.00 as nominal damages, $1,300,000.00 as exemplary damages against Defendant Hospital Authority of Gwinnett County and $5,000.00 as exemplary damages against Defendant Metro Ambulance Services, Inc., it is hereby ordered that the verdict of the jury shall be made the judgment of the Court.

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff R. Stanford Jones, as Administrator of the Estate of William Harold O'Kelley, shall have and re-

cover of Defendants Hospital Authority of Gwinnett County and Metro Ambulance Services, Inc., jointly and severally, $5,001.00, together with $1,300,000.00 from Defendant Hospital Authority of Gwinnett County and $5,000.00 from Defendant Metro Ambulance Services, Inc., together with interest thereon from the date of this Judgment at the rate of 12% as provided by law. Further, Plaintiff shall have and recover from Defendant Hospital Authority of Gwinnett County prejudgment interest in the amount of $60,000.00.

IT IS SO ORDERED this 27th day of September, 1988.

By: /s/ HARRIS ADAMS
Honorable Harris Adams, Judge
State Court of Cobb County

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Plaintiff, vs. HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC., Defendants.	CIVIL ACTION 87A-17816-4

AMENDMENT TO THE ANSWER AND DEFENSES OF THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, D.B.A. GWINNETT HOSPITAL SYSTEM TO COMPLAINT OF PLAINTIFF

[Filed April 14, 1988]

Comes now THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, d.b.a. GWINNETT HOSPITAL SYSTEM, erroneously designated as Gwinnett Ambulance Services, named as a defendant in the above-entitled action, and files this its Amendment To Its Answer and Defensive Pleadings to the Complaint of Plaintiff as follows:

NINTH DEFENSE

The statutes of the state of Georgia which authorize the imposition of aggravated, exemplary, or punitive damages (O.C.G.A. §§ 51-12-5 or 51-12-5.1) are contrary, by their

express terms and as they may be applied to this defendant in this case, to the Constitution of the United States and the Georgia Constitution, and are therefore void inasmuch as said statutes allow for the deprivation of property without due process of law (U.S. Constitution Amendments V and XIV; Georgia Constitution Article 1, Section 1, Paragraph 1) in that:

(1) Said statutes fail to define or provide advance notice of the prohibited behavior with reasonable clarity.

(2) Said statutes fail to specify the upper limit of damages to be imposed.

(3) Said statutes fail to set standards or criteria for the jury to apply in determining whether to impose punitive damages and, if so, the amount thereof.

As a consequence of the above defects in the statutes, the statutes leave to the unbridled discretion of a random jury whether to impose such damages and the amount thereof, thereby authorizing an award of aggravated, exemplary, or punitive damages which is unpredictable, arbitrary, capricious and disproportionate.

TENTH DEFENSE

The statutes of the state of Georgia which authorize the imposition of aggravated, exemplary, or punitive damages are contrary by their express terms and as they may be applied to this defendant in this case, to the Constitution of the United States and the Georgia Constitution, and are therefore void inasmuch as said statutes deny the defendant equal protection of the laws (U.S. Constitution Amendment XIV; Georgia Constitution, Article 1, Section 1, Paragraph 2) by providing fewer protections for civil litigants than the criminal laws provide to persons

accused of violation of criminal statutes which provide for the imposition of monetary fines in that:

(1) Said statutes fail to define or provide advance notice of the prohibited behavior with reasonable clarity whereas criminal defendants are entitled to such notice.

(2) Said statutes fail to specify the upper limit of damages to be imposed whereas criminal statutes imposing similar penalties must be limited.

(3) Said statutes allow imposition of such damages upon the "preponderance of the evidence" rather than the "beyond a reasonable doubt" standard applied in similar criminal cases.

(4) Said statutes contemplate the imposition of such damages against civil litigants who have been compelled to give evidence against themselves under the Georgia Civil Practice Act, whereas criminal defendants in similar cases cannot be so compelled.

ELEVENTH DEFENSE

The statutes of the state of Georgia which authorize the imposition of aggravated, exemplary or punitive damages are contrary, by their express terms and as they may be applied to this defendant in this case, to the Constitution of the United States and the Georgia Constitution, and are therefore void inasmuch as said statutes allow for the imposition of an excessive fine (U. S. Constitution Amendments XVIII and XIV; Georgia Constitution, Article 1, Section 1, Paragraph 17).

WHEREFORE, having added the above amendments to its defenses, this defendant prays:

(a) That the Plaintiff's Complaint be dismissed and for judgment in this defendant's favor and against the plaintifff, with all costs cast against the plaintiff;

(b) In the event that a judgment is entered in favor of the plaintiff against this defendant, then this defendant is entitled to total indemnity against Metro Ambulance Services, Inc.;

(c) That there be a trial by jury composed of twelve (12) persons;

(d) For such other relief as may be deemed just and equitable by the Court.

LONG, WEINBERG, ANSLEY & WHEELER

By /s/ MEADE BURNS

Meade Burns, Attorney at Law, P.C.
State Bar of Georgia No. 097000

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IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY,

Plaintiff,

vs.

HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC.,

Defendants.

CIVIL ACTION
NO. 87A-17816-4

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STRIKE PLAINTIFF'S CLAIM FOR EXEMPLARY DAMACES

[Filed July 7, 1988]

Comes now HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, d.b.a. GWINNETT AMBULANCE SERVICES, a defendant in the above-styled action and respectfully moves this Court pursuant to O.C.G.A. § 9-11-7(b)(2) to dismiss the plaintiff's claims of exemplary damages, or in the alternative, pursuant to O.C.G.A. § 9-11-12(f) to strike the plaintiff's claim for

exemplary damages, showing the Court the reasons more fully in the defendant's brief attached hereto.

LONG, WEINBERG, ANSLEY & WHEELER
By /s/ MEADE BURNS
Meade Burns, Attorney at Law, P.C.,
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IN THE STATE OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Plaintiff, vs. HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC., Defendants.	CIVIL ACTION NO. 87A-17816-4

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STRIKE THE EXEMPLARY DAMAGES CLAIMED

[Filed July 7, 1988]

[Brief Abbreviated]

Punitive damages are repugnant to the Georgia Constitution and the Constitution of the United States of America in that they deprive the defendant of life, liberty and property without due process of the law (U.S. Const. Amend. XIV, Ga.Const. Art. 1, §1, ¶1); they deny the defendant the equal protection of the laws (U.S. Const. Amend. XIV, Ga.Const. Art. 1, §1 ¶2); and they violate the excessive fines clauses of the Georgia and United States Constitution (U.S. Const. Amend. VIII, Ga. Const. Art. 1, §1, ¶17).

* * *

[The Brief then argues each of the foregoing constitutional provisions, citing decisions of this Court, among others.]

CONCLUSION

THEREFORE, any award of punitive damages that may be available in the present case, clearly violates constitutional prohibitions against excessive fines, they deny due process, and they deny the equal protection of the laws of the United States and the state of Georgia. The defendant respectfully requests that this Court dismiss or strike the claim for punitive damages in the present action.

Respectfully Submitted:

LONG, WEINBERG, ANSLEY & WHEELER

BY: /s/ MEADE BURNS

Meade Burns, Attorney at Law, P.C.
State Bar of Georgia No. 097000

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IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Plaintiff, vs. HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC., Defendants.	CIVIL ACTION NO. 87A-17816-4

ORDER

[Filed August 11, 1988]

The above-styled case having come before this Court on Motions to Strike or Dismiss Plaintiff's Claim for Exemplary Damages by Defendant Hospital Authority of Gwinnett County, Georgia, d/b/a Gwinnett Ambulance Services and Defendant Metro Ambulance Services, Inc., and Plaintiff's and Defendant Metro Ambulance Services, Inc.'s Motions in Limine, and after an oral hearing of said Motions, this Court, after examining the briefs, citations of authority and the file as a whole, finds as follows:

1.

Colonial Pipeline Co. v. Brown, 258 Ga. 115 (1988) is not authority which compels this Court to strike or dismiss the Plaintiff's claim for exemplary damages. The

issue of exemplary damages claimed in this case is an appropriate one for the jury to consider.

2.

The Defendants' remaining constitutional arguments to strike or dismiss the Plaintiff's claim for exemplary damages are without merit.

THEREFORE, it is ORDERED that both of the Defendants' Motions to Strike or Dismiss Plaintiff's Claim for Exemplary Damages are hereby DENIED.

In addition, those portions of the Plaintiff's and the Defendant Metro Ambulance Services, Inc.'s Motions in Limine which are not agreed to or withdrawn are hereby DENIED.

SO ORDERED, this 10th day of August, 1988.

/s/ A. HARRIS ADAMS
A. Harris Adams, Judge
State Court of Cobb County

MOTION FOR DIRECTED VERDICT

[Made September 23, 1988]

MR. BURNS: . . .

May it please the Court, on behalf of the Hospital Authority of Gwinnett County, I would move for the direction of a verdict on punitive damages, in that the evidence adduced during the course of the trial would admit of no verdict other than a verdict for the Hospital Authority of Gwinnett County, and more specifically the evidence brought forward during the course of this trial established that the negligence, if any, on the part of the Hospital Authority did not rise to that level of negligence as would warrant a finding of punitive damages against the Hospital Authority, and I would further move and suggest to the Court that the Hospital Authority of Gwinnett County is entitled to a direction of a verdict in its favor with respect to punitive damages because the Constitutional defenses — not only the Constitutional defenses of the State of Georgia, but the Constitutional defense of the United States of America as submitted to the Court previously in briefs, and read and ruled on by the Court — and I would like to adopt and incorporate those at this time — my brief in support of that motion to dismiss punitive damages, if that is agreeable with the Court — (T. 632-633)

JURY INSTRUCTIONS REGARDING PUNITIVE DAMAGES

[Given September 23, 1988]

Members of the Jury, where the law requires one party to pay damages to another, it seeks to see that the damages awarded are fair as to both parties.

If you believe from a preponderance of the evidence that the Plaintiff is entitled to recover, you should award to the Plaintiff such sums as you believe are reasonable and just in this case.

Now, the Plaintiff seeks nominal damages, and exemplary damages only in this case. If the injury is small, or mitigating circumstances are strong, only nominal damages are given. What would be a proper amount of nominal damages is a question for you to decide under all the facts and circumstances of this case.

The legal definition of nominal damages is a "small amount."

Now, in a tort action in which there are aggravating circumstances, either in the act or the intention, the Jury may give additional damages to deter the wrongdoer from repeating the trespass.

Punitive, that is aggravated damages, may be authorized when the circumstances of the wrong are such as to show an entire want of care, and an indifference to the consequences.

The measure of such damages is your enlightened conscience as an impartial Juror, and unless you find that the Plaintiff would be entitled to recover nominal damages as against a particular Defendant, you could not award exemplary damages against that Defendant.

Now, it is not essential to recover for punitive damages that the person inflicting the damages was guilty of willful and intentional misconduct. It is sufficient that the

act be done under such circumstances as evinces an entire want of care and conscious indifference to consequences.

Such conduct may constitute aggravating circumstances in the act which would authorize a Jury to give additional damages, that are also known as exemplary damages.

Now, the law does not permit you in arriving at your verdict to be governed by sympathy or prejudice. You may not, therefore, base your verdict in this case upon sympathy for or prejudice against either party.

On the contrary, your verdict must be supported by the evidence, based on the law as given to you in charge by this Court. (T. 743-745)

OBJECTIONS TO JURY INSTRUCTIONS ON PUNITIVE DAMAGES

[Made September 23, 1988]

MR. BURNS: May it please the Court, on behalf of my client we would take exception to the Court's charge to the Jury, or charges to the Jury on exemplary or punitive damages for the same reasons as expressed in our motion to dismiss punitive damages, the Constitutional reasons, and as we expressed on our motion for summary — directed verdict on Constitutional grounds, so we take exception to those charges on punitive damages, for those reasons.

THE COURT: I acknowledge the exceptions, but abide by my rulings, and for the same grounds, and upon the same reasons that I have set forth in my order and previous expressions denying the motion for directed verdict. (T.760-761)

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY,

Plaintiff,

vs.

HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC.,

Defendants.

CIVIL ACTION NO. 87A-17816-4

MOTION OF DEFENDANT, THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON ALL ISSUES AND FOR REMITTITUR OF THE VERDICT

[Filed October 7, 1988]

Comes now Defendant The Hospital Authority of Gwinnett County, Georgia, (hereinafter "Defendant Hospital Authority") and moves pursuant to O.C.G.A. §9-11-50(b) and pursuant to the Uniform State Court Rules to set aside the verdict rendered on September 23, 1988, in favor of Plaintiff and the Judgment entered thereon on September 27, 1988, and to have judgment entered in favor of Defendant Hospital Authority dismissing with prejudice Plaintiff's Complaint as to the claim for punitive damages in accordance with Defendant's Motion for Directed Verdict made at the close of all the evidence. As

grounds for this Motion, Defendant Hospital Authority shows:

1.

This action was tried to a jury beginning on September 19, 1988, and the jury returned its verdict in favor of Plaintiff for Five Thousand One Dollars ($5,001.00) in nominal damages jointly against both defendants, Five Thousand Dollars ($5,000.00) in punitive damages against Defendant Metro Ambulance Services, Inc. and One Million Three Hundred Thousand Dollars ($1,300,000.00) in punitive damages against this Defendant on September 23, 1988. Judgment on said verdict was entered on September 27, 1988.

2.

The close of all the evidence, Defendant Hospital Authority moved for a directed verdict in its favor on the grounds that the uncontradicted evidence showed that there were no aggravating circumstances in either the act or the intention of the Defendant Hospital Authority upon which to base an award of punitive damages and that the evidence introduced, with all reasonable deductions, demanded a verdict in favor of Defendant Hospital Authority.

3.

In addition, Defendant moved for a directed verdict in its favor on the grounds that the statutes of Georgia regarding punitive damages are repugnant to the Constitution of the State of Georgia and the Constitution of the United States of America in that they deprive the Defendant of life, liberty and property without due process of the law, deny the defendant equal protection of the law, and violate the excessive fines clauses of said Constitutions.

4.

Defendant's Motion for Directed Verdict at the close of all the evidence was denied by the Court.

IN THE ALTERNATIVE, Defendant moves to set aside the said verdict and judgment entered thereon and to order a new trial of all issues. As grounds, Defendant shows:

1.

The verdict and judgment are contrary to the great weight of evidence in that there was no negligent act or omission of the Defendant Hospital Authority upon which to base a claim for nominal damages.

2.

That the verdict and judgment are contrary to the great weight of evidence in that there were no aggravating circumstances in either the act or the intention of the Defendant Hospital Authority upon which to base a claim for punitive damages.

3.

The verdict and judgment are contrary to law in that the award of punitive damages is repugnant to the Constitution of the State of Georgia and the Constitution of the United States of America in that it deprives the Defendant of life, liberty and property without due process of the law, denies the Defendant equal protection under the laws, and violates the excessive fines clauses of the above-stated constitutions.

4.

The verdict is clearly so excessive as to be inconsistent with the great weight of evidence in the case.

5.

The verdict is so excessive that it clearly demonstrates gross mistake, prejudice or bias on the part of the jury thereby permitting the trial court to order a new trial or reduce the amount of damages awarded against this Defendant.

In support of this Motion Defendant submits herewith its brief containing argument and citation of authorities. Defendant reserves the right to add to and supplement the grounds for this Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial as to all issues and for Remittitur, upon receipt of the transcript of the trial record. Uniform State Court Rule 41.1 allows the trial court to hear motions for new trial immediately after filing and prior to the preparation of the transcript of proceedings.

WHEREFORE, Defendant Hospital Authority prays that its Motion be granted and that the verdict and judgment thereon in Plaintiff's favor be set aside and that judgment be entered in favor of Defendant dismissing with prejudice Plaintiff's Complaint as to the claim for punitive damages or, in the alternative, that a new trial as to all issues be ordered, or that the Court reduce the amount of punitive damages awarded against Defendant and that Defendant have such other and further relief as is just and proper.

RESPECTFULLY SUBMITTED this 7th day of October, 1988.

LONG, WEINBERG, ANSLEY & WHEELER

By /s/ MEADE BURNS

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THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY,

Plaintiff,

vs.

HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC.,

Defendants.

CIVIL ACTION
NO. 87A-17816-4

ORDER

[Filed January 19, 1989]

The above-styled case having come before this Court on Motion of the Defendant, The Hospital Authority of Gwinnett County, for Judgment Notwithstanding the Verdict on the Issue of Punitive Damages, and, in the Alternative, for a New Trial on All Issues and for Remittitur of the Verdict, and the Plaintiff having responded thereto, after an oral hearing on said motions and after considering the briefs of the parties, citations of authority and the entire record, this Court finds as follows:

The Defendant argues that the Court erred in failing to Direct a Verdict for this Defendant as to the Plaintiff's claim for punitive damages in that the Georgia statute which authorizes the imposition of punitive damages is unconstitutional and violates both the Constitution of the State of Georgia and the Constitution of the United States, in that it deprives the Defendant of life, liberty

and property without due process of law, denies the Defendant equal protection under the law, and violates the excessive fines clause of the Constitutions. The Defendant contends that denying this Motion was error and that the Defendant is entitled to Judgment Notwithstanding the Verdict as to this claim.

* * *

[The court next reviews the decisions relied upon by the Hospital Authority, including decisions of this Court.]

In conclusion, after reviewing Defendant's arguments and the response by the Plaintiff, Defendant's Motions for Judgment Notwithstanding the Verdict, Motion for New Trial and for Remittitur of the Verdict are all hereby DENIED.

So ordered, this 19th day of January, 1989.

/s/ A. HARRIS ADAMS
A. Harris Adams, Judge
State Court of Cobb County

IN THE SUPREME COURT OF
THE STATE OF GEORGIA

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, Individually and d.b.a. GWINNETT AMBULANCE SERVICES,

Appellant,

vs.

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY,

Appellee.

CASE NO. 46956

ENUMERATION OF ERRORS

[Filed May 19, 1989]

I.

The evidence was insufficient to support a verdict against The Hospital Authority of Gwinnett County, Georgia, awarding punitive damages, and, therefore, the trial court erred in refusing to grant a Motion for a Directed Verdict and denying a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on the issue of Punitive Damages and for Remittitur.

II.

The verdict and judgment awarding $1,300,000.00 in punitive damages against The Hospital Authority of Gwinnett County, Georgia, is excessive as a matter of law and the trial court erred in refusing to grant a Motion for Judgment Notwithstanding the Verdict or, in the Alterna-

tive, for a New Trial on the issue of Punitive Damages and for Remittitur.

III.

The punitive damage statute of the state of Georgia, O.C.G.A. § 51-12-5, is unconstitutional by its express terms and as it was applied to The Hospital Authority of Gwinnett County, Georgia, in this case, and the verdict and judgment for punitive damages against The Hospital Authority is unconstitutional and void inasmuch as the statute permits and the verdict and judgment constitute the imposition of an excessive fine and inasmuch as the statute and the verdict and judgment deny The Hospital Authority due process of the law and equal protection of the law. Therefore, the trial court erred in denying a Motion for Directed Verdict and a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on the issue of Punitive Damages and for Remittitur.

This 19th day of May, 1989.

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Supreme Court, U.S.
FILED
MAR 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1315

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE HOSPITAL AUTHORITY OF
GWINNETT COUNTY, GEORGIA,
Individually and d/b/a
GWINNETT AMBULANCE SERVICES,
Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate
of WILLIAM HAROLD O'KELLEY, Deceased,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1989

THE HOSPITAL AUTHORITY OF
GWINNETT COUNTY, GEORGIA,
Individually and d/b/a
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v.

R. STANFORD JONES, Administrator of the Estate
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Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

BRIEF IN OPPOSITION

STATEMENT OF CASE

I. Introduction

Respondent agrees that Petitioner has asserted — at least in the abstract — due process and equal protection claims at all relevant stages of the litigation below. After the Court has had an opportunity to consider the procedural context of this case, however, it will note the disparity between the constitutional claims verbalized below and the constitutional claims that the Petitioner actually litigated.

While the Respondent does not question Article III standing in this case, he will suggest that the Petitioner on this

record raises constitutional claims that are so generally formulated and so lacking in theoretical focus[1] that a favorable ruling on the Petitioner's behalf would generate more doubt about the award of punitive damages in this country than it could ever hope to resolve. Moreover, such a ruling would do so without the offsetting benefit of having *in this case* a reasonable framework from which to instruct the states about how to bring the law of punitive damages into compliance with federal constitutional standards. In reality, a series of clarifying and qualifying decisions[2] from this Court would be needed at a time when its dockets are heavily burdened and state legislatures throughout the country are effectively engaged in "tort reform," an important element of which is the examination of procedures and standards associated with the award of punitive damages.[3]

Respondent further suggests that neither the timing nor the procedural context of this case makes it suitable for the granting of the Petitioner's request for certiorari. Respondent will

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[1]Constitutional issues must be presented in clear cut and concrete form so that this Court can know exactly the elements of state law that are being called into question. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972).

[2]Perhaps the most apt illustration of this is the Court's constitutionalization of the law of defamation in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In the intervening years, the Court has had to consider and decide many cases dealing with the scope of the *New York Times* rule. Tribe, *American Constitutional Law* 861-890 (2nd ed. 1988).

[3]Georgia is one of the states that has enacted tort reform measures. They became effective July 1, 1987. See O.C.G.A. §§ 51-12-1; 51-12-5.1; 51-12-12. Included among these reform measures are: (1) a requirement that punitive damages be proven by clear and convincing evidence; (2) the award of punitive damages must be rendered through a special verdict form; (3) trials involving claims for punitive damages must be bifurcated; and (4) a statutory limit of $250,000 applies to the award of punitive damages.

show that Georgia, like virtually all jurisdictions, has genuinely formidable substantive and procedural standards to protect tort defendants against the award of unfairly large punitive damage verdicts. Respondent would point out here that the Hospital Authority took tactical advantage of ***almost none*** of these protective rules in the defense of this case.[4] If the Hospital Authority is dissatisfied with the outcome in this case, its complaint is not with the law of Georgia.

II. Facts

Respondent does not intend to burden the Court with a lengthy counter recitation of the facts in this case. However, some discussion of his theory of recovery and the key testimony in support of the verdict below is necessary to put a fairer perspective on the case than Petitioner's factual summary provides.[5]

Respondent litigated this case on the theory that the Hospital Authority acted wrongfully in two respects: (1) by overruling the unanimous judgment of the EMTs at the first accident site to call for a medivac helicopter to transport Mr. O'Kelley directly to the Grady Hospital burn unit in nearby Atlanta, Georgia; and (2) by placing Mr. O'Kelley — who was helpless at the time — in a position where he was forced to depart from a parking lot at Joan Glancy Hospital by helicopter under conditions that were unsafe and were known to be unsafe by Hospital Authority officials. To elaborate briefly, when Hospital Authority officials recognized that they would have to transfer O'Kelley from Joan Glancy to the nearest burn unit — where

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[4]In the context of federal habeas corpus litigation under 28 U.S.C. § 2254, a state criminal defendant is bound by the tactical decisions of his trial attorney. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[5]The Petitioner's statement of facts refers to some items of testimony that the jury discredited in whole or part. This Court does not sit to review questions of witness credibility or factual sufficiency.

Respondent contends he should have been taken all along — that option had been foreclosed. Joan Glancy Hospital had in fact admitted O'Kelley as a patient and, for that reason, Grady Hospital in Atlanta, which was the nearest burn unit, refused to accept the attempted referral. This made it necessary to transfer O'Kelley to a burn unit in Augusta, Georgia which is more than 125 miles from Joan Glancy Hospital. The helicopter crash in the Joan Glancy Hospital parking lot occurred in this atmosphere of confusion, mistake and haste.

Respondent will hereafter summarize the most important testimony and evidence in further support of the jury's verdict below:

1. Four persons with EMT certification were at the scene of Mr. O'Kelley's automobile accident initially. The two EMTs from the Hospital Authority arrived next. All agreed that O'Kelley needed to be transported immediately to the burn unit at Grady Hospital in Atlanta, Georgia — a 15 to 20 minute helicopter ride away. When the two Hospital Authority EMTs got to the accident site, one reiterated the need to call for a helicopter. During this brief time span, the Hospital Authority's Emergency Medical Service supervisor was in radio contact with his EMTs. Twice he instructed them to take O'Kelley to Joan Glancy instead of Grady Hospital. The first time was *before* the arrival of the EMTs at the accident. The second was to *overrule* the suggestion of one of his own EMTs — concurred in by all other EMTs at the automobile accident site — to transport O'Kelley by helicopter directly to the Grady Hospital burn unit. At this time, an emergency helicopter was in the air, only a very few minutes away, and police at the accident scene were trying to set up a landing area. The Hospital Authority's Emergency Medical Service supervisor followed these developments by radio.

2. One witness who worked as Captain in charge of the Communications Department of the Gwinnett County Fire Department testified that in his years of experience the Hospital Authority had "several hundred times" directed emergency cases to its own hospitals when other hospitals either were closer geographically or were more appropriate facilities from a medical standpoint as was the case with Mr. O'Kelley's severe burn injuries. There was testimony to the effect that revenue considerations influenced the Hospital Authority to divert emergency cases in this manner.

3. There was no *contemporaneous* medical judgment that O'Kelley needed to be taken to Joan Glancy Hospital first before being routed to the nearest burn unit. Indeed, when a staff physician learned that O'Kelley had in fact been brought to Joan Glancy, he reacted with irritation and stated: "Why was he brought here? I thought that we had talked about this."

4. Three experts testified on Respondent's behalf concerning the use of the parking lot at Joan Glancy Hospital as a helicopter landing site. All stated that it was unsafe. One described the parking lot as "an accident waiting to happen" and observed that "the departure of the helicopter was through an obstacle course of obstructions." He further stated that if the parking lot was used as a landing site, it was subject to FAA regulation and safety inspection. This expert had checked FAA records and found that the Hospital Authority had not applied to operate the parking lot at Joan Glancy Hospital as a heliport. A second expert, who had worked as Aviation Section Commander in the Gwinnett County Police Department and had served as Gwinnett County Administrator, testified not only that the parking lot at Joan Glancy was unsafe for helicopter landing and departure, but that he had specifically advised the Assistant Administrator of the Hospital Authority of his opinion several years prior to the

O'Kelley helicopter crash. These warnings were ignored and helicopters landed at Joan Glancy on a fairly regular basis thereafter.

5. Even *after* the helicopter crash at issue in this case, the Petitioner on at least one occasion has been on the verge of allowing a helicopter to land in the Joan Glancy parking lot. The incident, which occurred in the spring of 1988 only a few months before this case was tried to a jury, involved another burn victim. As in the O'Kelley case, the EMTs at the scene apparently wanted to evacuate the victim to the Grady Hospital burn unit in Atlanta. Quite by coincidence, a police officer who had been present at the scene of the O'Kelley helicopter crash was present in the Joan Glancy emergency room. One of the physicians on duty there ordered the burn victim to be brought to Joan Glancy. This police officer, who testified for Respondent, screamed out "No" and, immediately afterwards, a nurse screamed out "No" as well. The burn victim was more fortunate than Mr. O'Kelley. She was taken directly to the Grady Hospital burn unit as Mr. O'Kelley should have been.

Respondent argued to the jury that these circumstances were "aggravated" within the meaning of O.C.G.A. § 51-12-5 and more particularly that the Hospital Authority's actions imperiled Mr. O'Kelley's life — already very much in danger — and did so under circumstances evidencing a *conscious* disregard for the threat to Mr. O'Kelley's well being. Though the testimony at trial was in sharp conflict on many points, the jury credited the Respondent's evidence and returned a verdict against the Petitioner and its co-defendant Metro Ambulance Services, Inc. Despite the Petitioner's vigorous attempt to cast the blame for the parking lot crash on the helicopter pilot, the jury held the Petitioner almost exclusively responsible for the aggravating circumstances present in this case and awarded punitive damages against the Petitioner

in the amount of $1,300,000. The punitive damages verdict against Metro Ambulance Services, Inc. was only $5,000.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Due Process Argument

Petitioner's due process challenge to O.C.G.A. § 51-12-5 has two components. The first is that the threshold legal standard for the award of punitive damages in Georgia and in virtually every other jurisdiction in the United States is unconstitutionally vague. The second is that even if the threshold standard for the award of punitive damages in Georgia can withstand attack, the standard for limiting the size of punitive damage awards is unconstitutionally vague and can be struck down independently. The Respondent contends that the Georgia Supreme Court below applied the correct federal constitutional standards and decided the due process challenge to O.C.G.A. § 51-12-5 in a manner fully consistent with those standards.

A. The Threshold Standard for the Award of Punitive Damages Is Not Unconstitutionally Vague.

Under Georgia case law, as the court below held, a jury can award punitive damages only if it finds "wilful misconduct, malice, fraud, wantonness or oppression or that entire want of care that raises a presumption of a conscious indifference to consequences." *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 761, 386 S.E.2d 120, 124 (1989). Throughout the litigation of the case below, the Petitioner contended forcefully that this standard was unconstitutionally

vague — that a properly instructed jury could not intelligently and fairly apply it to the facts of the case at hand. In rejecting this contention, the Georgia Supreme Court correctly recognized that *Village of Hoffman Estates v. Flipside,* 455 U.S. 489 (1982) established the governing standard for resolving vagueness challenges to statutes imposing *civil* rather than criminal penalties. This standard is less exacting than the vagueness standard applicable in criminal statutes. Of particular relevance to *this* case was the statement in *Hoffman Estates* that where a scienter requirement is an element of proof in the enforcement of a civil penalty, the existence of that requirement would save an otherwise vaguely written statute from invalidation. *Id.* at 499-500.

When the Georgia Supreme Court ruled in this case, it found at a minimum that the "conscious indifference to consequences" standard was tantamount to a scienter requirement and as such it nullified the Petitioner's facial attack on O.C.G.A. § 51-12-5. Certainly, under this standard the Petitioner had a full and fair opportunity to develop its contentions before the jury concerning the *degree of risk,* if any, created as a result of the Hospital Authority's decisions and actions. It had a similar opportunity to convince the jury that, however much blame the Hospital Authority might have to accept for what happened to Mr. O'Kelley, the agents and employees of the Hospital Authority did not exhibit a *conscious* indifference to his well being. Respondent submits that the Petitioner tenaciously litigated these factual issues. The jury in this case, however, did not credit the defense offered on behalf of the Petitioner. The Petitioner's real complaint here is not with the law of Georgia; it is with the jury's assessment of the facts. This Court, of course, does not sit to undertake *de novo* review of jury determinations of witness credibility and fact. For this reason, a grant of the writ of certiorari on this aspect of the Petitioner's due process claim would be inappropriate.

An alternative way of evaluating the Petitioner's vagueness challenge to the "conscious indifference to consequences" standard is to compare it to liability standards that apply in other legal settings. For example, in Georgia *criminal* negligence is defined as "reckless conduct such as shows indifference to the injurious result of negligent acts, an indifference to the safety of others, and a lack of consideration for their welfare." Vol. 2 *Suggested Pattern Jury Instructions* 32 (Council of Superior Court Judges of Georgia; 1984). This instruction has never been successfully challenged on vagueness grounds.[6]

A recommended federal jury instruction for "actual malice" in defamation actions involving public figures and media defendants provides: "A publication is made with 'actual malice' if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not." Vol. 3 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions*, § 84.09 (1987). Interestingly, the Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964) from which this standard derived has been applauded as an *advance* in the protection of the first amendment rights of the press. It is surely no less vague than the Georgia standard for the award of punitive damages. It is worthy of note that the *New York Times*

[6]To pursue this comparison one step further, consider the Model Penal Code definition for criminally reckless conduct. In section 2.02(c), the Model Penal Code provides: "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." While the precise language of section 2.02(c) is different from the "conscious indifference to consequences" standard, both define a similar level of culpability and do so with reasonable clarity. Neither is subject to serious constitutional challenge on vagueness grounds.

actual malice standard is not only constitutional; it is constitutionally *required* under current first amendment principles.

Finally, in the context of litigation under 42 U.S.C. § 1983, the Supreme Court has sustained a jury instruction concerning the award of punitive damages which provides: "[I]f the conduct of one or more of the defendants is shown to be a *reckless or callous disregard of, or indifference to, the rights or safety of others,* then you may assess punitive or exemplary damages in addition to any award of actual damages." *Smith v. Wade,* 461 U.S. 30, 33 (1983) (emphasis supplied by Court). Although the decision in *Smith v. Wade* was split 5-4, the difference between the majority and the dissenters was over the proper reading to be given to section 1983 in light of its legislative history and considerations of public policy. No weight was given to *constitutional* considerations such as vagueness in the decision of the case.

In many areas, the law is built upon general standards and it could not function otherwise. This is particularly true at the state level where the primary responsibility for the enforcement of common law principles resides. The judicial process is the mechanism through which the generalities of the law are brought to bear in individual cases. The role of effective advocacy in this process is, of course, critical. As long as the law is specific enough to inform the jury about what is at stake legally, the presentation of evidence and argument by counsel in light of the general legal standard is sufficient to satisfy due process requirements of notice and fair play. When the jury in the present case awarded punitive damages against the Petitioner, it understood fully what it was doing and why. The Petitioner was not disadvantaged by the supposed generalities of the "conscious indifference to consequences" standard.[7]

[7]The case law standard, which the Petitioner challenges as unconstitutionally vague, was *codified* as a part of Georgia's tort reform package effective July 1, 1987. *See* O.C.G.A. § 51-12-5.1(b).

The Petitioner has not cited a single punitive damages decision, either state or federal, in support of its vagueness argument. There is no conflict among the state courts or the federal circuit courts. None of the customary criteria for the grant of certiorari is present in connection with this aspect of the Petitioner's due process argument.

B. The Standards Limiting the Size of Punitive Damages Awards Are Proper in Conception and Clear in Legal Formulation.

The second component of the Petitioner's due process challenge to O.C.G.A. § 51-12-5 suffers from the same flaws described in the preceding section and in addition is based on a procedural record barely adequate to show standing to raise the issue. According to the Georgia Supreme Court below, if a jury decides to award punitive damages, it is subject to a number of substantive constraints on the size of the award that it is authorized to return. *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 764 n. 13, 386 S.E.2d 120, 124 n. 13 (1989).

First and foremost, a punitive damages award must be for the sole purpose of deterring the wrongdoer, not third parties, from repeating the wrong. Second, the jury can consider the following factors in fixing the amount of punitive damages to be awarded: (1) the egregiousness of defendant's conduct; (2) the extent and duration of the wrong and the possibility of its recurrence; (3) the defendant's intent; (4) the profitability of the defendant's wrongdoing; (5) the amount of actual damages awarded; (6) previous awards of punitive damages, if any, against the defendant arising from the same conduct; (7) potential or prior criminal sanctions against the defendant based on the same wrongful act; and (8) any other pertinent circumstances. Id. 259 Ga. at 760-66, 386 S.E.2d 122-26.

Finally, jury verdicts which appear to be based on gross mistake or undue bias can be set aside by the trial judge. O.C.G.A. § 51-12-12. Some or all of these factors are used to structure jury discretion in the award of punitive damages in many jurisdictions. 1 Callaghan, *Punitive Damages Law and Practice* § 3.03.

To put the point as civilly as possible, Petitioner's contention that the only limit in Georgia on the jury's authority to award punitive damages is the "enlightened conscience of the community" is simply wrong. The Petitioner in substance wants to attack O.C.G.A. § 51-12-5 without acknowledging the authoritative judicial interpretations that have been given to that provision. Nowhere in the petition for certiorari is there even an acknowledgement of the factors considered by the Georgia Supreme Court to be relevant to the jury's exercise of discretion in setting punitive damages. Nowhere is there a challenge to the relevance or the propriety of using any one of these factors in the jury's deliberations on punitive damages. Frankly, Respondent does not know what the Petitioner expects this Court to review. Supreme Court Rule 14.5 provides as follows: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition [for certiorari]." It is surely applicable here.

If needed, there are additional reasons to deny the petition for certiorari on this question. Consider what the Petitioner did *not* do tactically and procedurally in this litigation to respond to the Respondent's demand for punitive damages. Upon a consideration of these choices, the Court will be hard pressed to believe that the Petitioner in this case has suffered an injustice because of the alleged constitutional flaws of O.C.G.A. § 51-12-5 and the decisions construing it.

1. Petitioner did not request a bifurcated trial which it had the right to seek under *Moore v. Thompson*, 255 Ga. 236, 336 S.E.2d 745 (1985). This procedure has many advantages for tort defendants. Foremost among them is the fact that a tort defendant can aggressively oppose liability without compromising its ability to argue, if necessary, against a request for a substantial award of punitive damages. At the damages phase, a tort defendant can introduce evidence that it would be hesitant to offer in a trial where both liability and punitive damages are determined in a unitary proceeding. In the context of the trial below, had it been bifurcated, the Petitioner could have developed several matters at the damages phase. It could have elaborated on the meaning and significance of its claim to non-profit status.[8] Since vicarious liability was involved, the Petitioner could have shown whether disciplinary action was taken against the employees directly responsible for the handling of the O'Kelley case. Finally, the Petitioner could have offered proof of subsequent remedial measures such as the construction of a safe helicopter landing site as well as the formulation of better procedures for routing emergency cases by ambulance to the most appropriate hospital. As the case was actually tried, however, the Petitioner presented almost no evidence in mitigation of punitive damages.

2. Although the Petitioner challenged the trial court's instruction on punitive damages, it did not offer any special instructions designed to focus the jury's consideration of this issue. In light of the factors mentioned earlier, a charge request of this nature would have been most helpful

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[8]The Supreme Court of Illinois has pointed out that the *plaintiff* in a case involving an award of punitive damages is under no obligation to present evidence of the *defendants'* financial condition. *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989).

to offset the disadvantage to the Petitioner resulting from its failure to request a bifurcated trial.[9]

3. After the trial, the Petitioner filed a motion for judgment n.o.v. or, in the alternative, a motion for new trial and remittitur. It preserved its constitutional claims in a *pro forma* manner, but did not seek to offer any evidence to substantiate its contention that the punitive damages award was unconstitutionally excessive. As the Georgia Supreme Court pointed out below, the trial judge sometimes functions as the thirteenth juror. *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 765, 386 S.E.2d 120, 125 (1990). In this capacity, the trial judge has a significant degree of control over damage awards. O.C.G.A. § 51-12-12. In addition, the trial judge has very broad authority to grant a request for a new trial. O.C.G.A. § 5-5-20. This, too, can serve as a check on excessive damage verdicts because the trial judge can make an order for a new trial conditional upon the plaintiff's willingness or unwillingness to accept remittitur. Since the Petitioner did not request a bifurcated trial in this case, one might have expected an all-out attempt to appeal to the trial judge through post-trial motions. The record, however, does not reflect that.

4. Finally, the Georgia Supreme Court below emphasized that the appellate courts could set aside excessive damage awards even if the trial court did not see fit to do so under O.C.G.A. § 51-12-12. *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 766, 386 S.E.2d 120, 126 (1989). While admitting that appellate reversals of damage awards are not an everyday occurrence, it made clear that the safeguard was a substantial one. *Id.* In this vein, this Court should be aware

[9]In *Palmer v. A.H. Robins, Co., Inc.*, 684 P.2d 187, 219 (1984), the defendant's failure to request an instruction on *factors* governing the award of punitive damages barred appellate review. The defendant in *Palmer* challenged the adequacy of the jury instructions at trial but offered none of its own that would have cured the defects raised on appeal.

that the Georgia Supreme Court recently exercised its authority to set aside an award of punitive damages in a major case. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988) (plurality opinion). In the present case, the Georgia Supreme Court reviewed the entire record in light of the standards enunciated in its opinion. It concluded:

> [U]nder the circumstances presented, the trial judge did not abuse its discretion in refusing to overrule the jury's punitive damage award. Nor, do we find the judgment so excessive as to be unconstitutional. 259 Ga. at 766, 386 S.E.2d at 126.

Respondent recognizes that some members of this Court have expressed concern about the clarity of the legal standards used to limit the size of punitive damages awards in civil cases. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, _____ U.S. _____, 109 S. Ct. 2909, 2923-24 (1989). No doubt the laws of some states have specific flaws that are of sufficient importance nationally to justify the exercise of jurisdiction by this Court. But the law of Georgia concerning the award of punitive damages would appear to be reasonably calculated to produce fair outcomes. It preserves the basic right to trial by jury in tort cases, but at the same time recognizes that lay persons on the jury need some guidance to decide whether to award punitive damages in the first place and, if so, in what amount. The procedural framework, particularly the right to request a bifurcated trial, and the substantive factors that guide the jury give tort defendants in Georgia many tools to influence the jury's perception of the need for punitive damages in a given case. The jury's decision, of course, is not final. If it reaches a verdict that is demonstrably excessive, both the trial and appellate courts have ample authority to set aside unlawful and unjust punitive damage awards. *See, e.g., Colonial Pipeline v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988).

Within this framework, the Petitioner did not fare well. But, the Petitioner's distaste for the outcome below does not readily transform this case into an example of the evil of a runaway jury eager to dip into the deep pocket of a wealthy, but hapless defendant. This certiorari petition represents the last hope of the Petitioner in its quest to avoid liability for its involvement in Mr. O'Kelley's tragedy. At this juncture, the case is truly a dispute between the parties without any national import. Certiorari should not be granted on this aspect of the due process issue as well.

II. Equal Protection Argument

When this case first began working its way through the appeals process, a decision had not yet been rendered in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, _____ U.S. _____, 109 S. Ct. 2909 (1989). Of course, the contention under consideration in *Browning-Ferris* was whether punitive damages are the constitutional equivalent of criminal fines and hence subject to control under the excessive fines clause of the eighth amendment. This Court rejected the proffered analogy. It emphasized that given the background of the eighth amendment, the excessive fines clause establishes a limit on the power of *government* to impose and collect fines. The clause was not intended as a control on the jury.

The Petitioner resorts to the legerdemain of equal protection analysis to try to repackage the analogy rejected by this Court in *Browning-Ferris*. In fact, the Petitioner's theory here is even *broader* than the contention in *Browning-Ferris*. Simply put, the Petitioner argues along the following lines: because the deterrence purpose of punitive damages in civil cases overlaps with a penal objective of the criminal law, the constitutional safeguards available to criminal defendants at trial

should be similarly available to tort defendants subject to the *possible* award of punitive damages.

Perhaps because the argument has truly breathtaking ramifications, the Petitioner trims it back a bit toward the end of the equal protection section of its petition when it appears willing to settle for the reasonable doubt standard and double jeopardy in cases involving punitive damages. Petition for Certiorari at 23. At the same time, the Petitioner neglects to mention the safeguards available under Georgia law as it now stands that it did *not* employ at trial. In passing on this argument, the Respondent would ask this Court to reflect on two questions. How was the Petitioner disadvantaged by the preponderance of evidence standard in this case when it chose to put on no evidence in mitigation of punitive damages? Why is the double jeopardy principle relevant to this case when the record does not reflect multiple punishment in the form of duplicative awards of punitive damages?

No court that Respondent is aware of has ever accepted an equal protection argument like the Petitioner's. Few, if any, have ever taken it seriously.[10] In essence the Petitioner would like to have this Court render an advisory opinion on the law of punitive damages through the medium of equal protection analysis. It would be difficult to imagine a question more ill-suited for consideration by this Court. The grant of certiorari on this issue would be a waste of limited time on the oral argument calendar.

---

[10]This argument has been made on equal protection as well as due process grounds. Neither formulation has been persuasive. *See, e.g., Olson v. Walker*, 781 P.2d 1015 (Ariz. App. 1989); *Downey Savings & Loan Ass'n. v. Ohio Casualty Ins. Co.*, 189 Cal. App.3d 1072, 234 Cal. Rptr. 835 (1987); *Unified School Dist. No. 490 v. Celotex Corp.* 6 Kan. App.2d 346, 629 P.2d 196 (1981); *Sturm, Roger & Co. v. Day*, 594 P.2d 38 (Alaska 1979).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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Supreme Court, U.S.
FILED
MAR 28 1990
JOSEPH E. SPANIOL, JR.
CLERK

No. 89-1315

In The Supreme Court
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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This brief is filed in reply to the brief of respondent in opposition to the petition for certiorari. Rule 15.6. Petitioner, Hospital Authority of Gwinnett County ("the Hospital Authority"), submits that the petition for certiorari, augmented by this reply, amply demonstrates that the writ of certiorari to the Supreme Court of Georgia should be granted.

I. THE FACTS

The facts in this case demonstrate that the punitive damages award against the Hospital Authority was unconstitutional. The evidence at trial was disputed; but even viewed in the light most favorable to respondent, the facts do not show conduct which might be expected to subject the Hospital Authority to liability for more than one million dollars in punitive damages.

This case arose from a serious automobile accident involving a medical emergency in which the plaintiff's decedent, Mr. O'Kelley, was severely burned and mortally injured. At the accident scene, the advanced EMT in charge, being unable to begin an IV, made the decision to transport O'Kelley 1.3 miles to the emergency room at Joan Glancy Hospital rather than to place him on an approaching helicopter where necessary stabilization measures would be difficult or impossible to perform. The medical testimony of the attending physicians, after being fully informed of the difficulty experienced in starting the IV, confirmed the soundness of this medical decision, but it was this medically sound judgment that formed the basis for plaintiff's recovery of punitive damages.

The helicopter landed at Joan Glancy Hospital. Nearly two hours passed before the pilot was required to take off again, giving him ample time to orient himself to the surroundings and to prepare for take-off. There was no atmosphere of "confusion, mistake, and haste." There is, furthermore, no contention in this case that Mr. O'Kelley received any less than the same quality of medical care that he would have received had he been flown directly to the parking lot at the Atlanta Civic Center, loaded into an ambulance, and transported several blocks to Grady Hospital, the alternative facility available at the time of the accident. Loading and transport to Grady would necessarily have required considerably more than the 15 to 20-minute ride suggested by respondent. Joan Glancy Hospital was less than two miles from the site of the accident.

Respondent contends that, in other cases, the Hospital Authority had diverted patients away from nearby hospitals, or away from more medically appropriate hospitals, in deference to its own institutions. Even accepting the questioned credibility of the testimony concerning such conduct, it was nonetheless undisputed in the instant case that Joan Glancy Hospital was the hospital nearest to the scene of the accident, and that it offered a well-qualified medical facility fully capable of stabilizing and treating this patient and, if necessary, arranging transport to a specialized burn treatment facility. Furthermore, there were sound medical reasons for transporting this severely burned patient 1.3 miles to Joan Glancy rather than risking a helicopter flight without commencing medical treatment. There was no evidence of the "revenue considerations" suggested by respondent, other than the hospital's bill for its services totaling approximately $1,200.

The helicopter crash resulted from pilot error, not negligence, much less willful misconduct, on the part of the Hospital Authority. The pilot had landed safely, and he had been on the scene for approaching two hours, sufficient to have investigated the take-off conditions. Whether arising from a manual mistake by the pilot, or an empty helicopter water-alcohol tank, the error causing the crash should not have been attributed to the hospital.

It is undisputed that Mr. O'Kelley was only slightly injured, if injured at all, as a result of the helicopter crash. After the crash, he was reexamined in the emergency room, and then transported to the burn unit at Grady Hospital in Atlanta, where he was appropriately treated. At all times, he received proper medical care. Any actual damages suffered, as reflected by respondent's claim to only nominal damages (A-27), were negligible.

II. CONSTITUTIONAL CONSIDERATIONS

A. Due Process, Vagueness, and the Georgia Law.

Respondent's arguments are not responsive to petitioner's constitutional challenges. The scant guidance given the jury in this case was that punitive damages might be awarded "where there are aggravating circumstances, either in the act or the intention"; that such damages "may be authorized where the circumstances of the wrong are such as to show an entire want of care, and an indifference to the consequences"; and that willful and intentional misconduct is not required (A-27-28). "It is sufficient," the jury was instructed, "that the act be done under such circumstances as evinces an entire want of care and conscious indifference to consequences." (A-27-28) In essence, this was the sum total of the guidance given.

Respondent's reliance upon the scienter requirement recognized in *Village of Hoffman Estates v. Flip Side*, 455 U.S. 489, 498-499 (1982), as well as the Georgia Supreme Court's reliance thereon (A-7), is misplaced. The ordinance in question in *Flip Side* required a business to obtain a license if it sold items "designed or marketed for use with illegal cannabis or drugs." As the court noted, the illegal drugs were specified by law, and the words "designed" and "marketed" were sufficient to put the business on notice that a license was required. There is no comparable scienter requirement contained in "an entire want of care, and an indifference to the consequences," as the jury was instructed were the conditions upon which it could award punitive damages here (A-27).

Application of Georgia law to this case does not provide any notice of prohibited conduct to the defendant and does not provide the jury any discernible standard for determining when specific conduct warrants the imposition of punitive damages and, if so, how much. Contrary to respondent's assertion, punitive damages are at least quasi-criminal, and, as such, are subject to a "relatively

strict test" for vagueness. *See Village of Hoffman Estates v. Flip Side, supra.* In this case, the law in Georgia is unconstitutionally vague.[1]

B. Standards for Determining the Amount of Punitive Damages.

The Supreme Court of Georgia in the instant case tacitly recognized the lack of ascertainable standards for awarding punitive damages, by suggesting in this case, for the first time, that the trial courts in Georgia "consider" charging on eight factors appropriate to a punitive damages verdict (A-8 n.13). (Respondent's implication that petitioner was protected by these eight factors, first announced on appeal in this very case, is inappropriate, to say the least.) The Georgia law, nevertheless, is clear that the measure of punitive damages is no more than "the enlightened conscience of an impartial jury." *Curl v. First Federal Savings and Loan Association*, 243 Ga. 842, 257 S.E.2d 264 (1979); *Kolodkin v. Griffin*, 87 Ga. App. 725, 732, 75 S.E.2d 197 (1953); *Head v. John Deere Plow Co.*, 71 Ga. App. 276, 279, 30 S.E.2d 662, 664 (1944).

"The measure of such damages is your enlightened conscience as an impartial juror . . . ," the jury was instructed (A-27). No other standard was provided, or required by Georgia law. Allowing this "wholly standardless discretion" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988)) violates the due process rights of defendants, subjects them to the whims of a jury, and exposes them to punitive damages awards "frequently based upon . . . caprice and prejudice." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

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[1] "A vague law impermissibly delegates basic policy matters to . . . judges, and juries for resolution on an *ad hoc* and subjective basis with attendant dangers of arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

Post-trial judicial review in Georgia does not eradicate the constitutional infirmities inherent in Georgia law in allowing juries to award punitive damages without guidance in the first instance. O.C.G.A. § 51-12-12 expressly states that "[t]he question of damages is one for the jury; and the Court should not interfere with the jury's discretion unless the damages are so small or excessive as to justify the inference of gross mistake or undue bias . . .." Such a post-verdict review on its face provides little protection.

The other post-trial review mechanisms are similarly deferential to jury determinations. Under O.C.G.A. § 5-5-20, on a motion for new trial, if the judge can conscientiously acquiesce in the verdict, even though it may not exactly accord with his best judgment, he should approve it, and the appellate courts will uphold him in so doing. *Holland v. Williams*, 3 Ga. App. 636, 638 (1907), *quoted in Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120, 130 (1989) (Appendix A-1, 10). Likewise, this implied presumption in favor of the jury's standardless determination provides little real protection against an arbitrary and capricious jury award of punitive damages.

Nor does O.C.G.A. § 51-12-12 provide the review necessary to overcome the constitutional defects. Only if an award is so excessive "as to shock the judicial conscience," will it be disturbed. The threshold is set so high as to be meaningless in the context of a punitive damage award. Review of the Georgia case law shows that the authority to set aside under all these post-verdict mechanisms has been rarely and sparingly applied. None of these post-trial procedures counterbalances the standardless discretion accorded Georgia juries to return such verdicts in the first instance.

Suggesting that petitioner might have requested a bifurcated trial simply avoids the issues presented. Allowance of bifurcation is discretionary with the trial court, O.C.G.A. §§ 9-11-42, 9-11-21; *Wheels & Brakes, Inc. v.*

Capital Ford Truck Sales, Inc., 167 Ga. App. 532, 307 S.E.2d 13 (1983), and, in practice, is rarely granted. A defendant is not entitled to bifurcation as a matter of right; but even if bifurcation were mandatory, such a procedure would not address the vagueness of the threshold determination of prohibited conduct or the vagueness of the standards applied to the determination of the amount of punitive damages.

Contrary to respondent's contention, petitioner is not required to request charges on the allowance of punitive damages, for which it denies any liability whatsoever, and as to which the court is required to charge correctly on the law. The court has a duty to charge the jury on the law applicable to all substantial issues involved, even without request. *Moon v. Moon*, 216 Ga. 627, 118 S.E.2d 473 (1961); *Dorsey v. Green*, 204 Ga. 453, 49 S.E.2d 901 (1948). Petitioner submits that the trial court charged in accordance with the existing Georgia law. The charge was error, however, because the Georgia law is unconstitutional for the reasons outlined elsewhere herein and in the original petition.

C. Equal Protection.

Petitioner submits that the penal nature of punitive damages is beyond argument. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2932, 106 L.Ed. 2d 209 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, *supra* at 87; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Punitive damages subject defendants to penalties in the form of damages which may be financially devastating and stigmatizing, without the protection that criminal defendants subject to fines are constitutionally guaranteed. This invidious discrimination between civil and criminal defendants amounts to a denial of equal protection under the stricter scrutiny which the criminal or quasi-criminal nature of punitive damages ought to require. *See, e.g., Village of Hoffman Estates v. Flip Side*, *supra* at 499-500.

Respondent contends that petitioner was not disadvantaged by the absence of a higher standard of proof because petitioner allegedly chose not to put up evidence in mitigation of punitive damages (Respondent's Brief at 17). Presumably, respondent also would contend that a criminal defendant who puts the state to its burden of proof "beyond a reasonable doubt," presenting no evidence, would similarily not be disadvantaged if the court, instead, applied a preponderance of the evidence standard. Respondent's position is patently untenable. It is the punitive and penal nature of punitive damages which should, in the interests of both equal protection and due process, require an elevated standard of proof, not the quantity of evidence put up. *See Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

Petitioner submits that similarly situated defendants, subject to punitive and penal damages (or fines), should be protected by the same procedural safeguards. Civil defendants subject to punitive damages in Georgia are not afforded equivalent protection, however, against arbitrary and capricious jury awards, and are thus depreived of equal protection of the laws.

III. CONCLUSION

Certiorari should not be denied, as respondent implies, because of the 1987 revision of O.C.G.A. § 51-12-5 into what is now O.C.G.A. § 51-12-5.1 (which is inapplicable here). The new code section merely codifies the prior case law definition of "aggravating circumstances," to wit, "wilful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." O.C.G.A. § 51-12-5.1. The same standardless discretion has, therefore, been imported into the new statute, in-

fecting it as well. The petition for writ of certiorari to the Supreme Court of Georgia should be granted.

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Supreme Court, U.S.
FILED
MAR 16 1990
JOSEPH F. SAPNIOL, JR.
CLERK

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Since the filing of the Petition for Writ of Certiorari in this case on February 16, 1990, it has come to our attention that on February 7, 1990, a petition for writ of certiorari was filed in *Pacific Mutual Life Insurance Company v. Haslip, et al.*, No. 89-1279.

If the Court is inclined to grant the petition in *Pacific Mutual*, petitioner herein urges the Court to consider joining the *Pacific Mutual* petition with the petition in the instant case. Although some of the issues raised in each

petition are similar, there are strikingly different issues raised in each case, and granting both petitions will bring before this Court all of the significant due process and equal protection issues involving punitive damages for consideration at one time.

The different issues being raised in these two petitions include the following:

(1) *Equal Protection.*

The equal protection issues in the two cases are complementary and raise different aspects of equal protection analysis. The one equal protection issue raised in *Pacific Mutual* (question 5) is not specifically included in the equal protection issue raised in the instant petition (question 2, and p. 23), while the equal protection issues in the instant petition are more broadly based. All issues should be resolved by this Court.

(2) *Punitive Damages as Criminal in Nature.*

The hypothesis of the *Pacific Mutual* petition apparently is that punitive damages are criminal in nature. *See* question 4 and accompanying text at 22-24. Without conceding that punitive damages are not criminal in nature, the hypothesis of the instant petition and our brief on the merits is, and will be, that punitive damages are, at minimum, quasi-criminal, and therefore entitled to at least a level of scrutiny between that afforded in civil cases and criminal cases. *See* Petition in this case at 16 par. (f), 18, 22.

(3) *Respondeat Superior.*

The *Pacific Mutual* case involves the respondeat superior theory of liability for punitive damages (question 2), whereas this case does not. The Court could dispose of the *Pacific Mutual* case on the basis of non-liability under the respondeat superior theory, and thus not reach the other significant issues raised in that case, and in this case.

(4) *Excessiveness.*

The *Pacific Mutual* case involves the question (No. 3) of whether the punitive damages awarded against it were grossly excessive in violation of its right to due process. While that issue is not specifically raised in this case, the issue of whether the Georgia statute is unconstitutional because it fails to set forth any clear, constitutionally acceptable standards for juries to apply in determining the amount of such damages is raised in this case. *See* Petition at 16, 17, 19.

There are other important differences between the two cases upon which the Court may wish to focus, including the following:

> The *Pacific Mutual* case apparently involves an intentional tort, fraud, arising out of a contractual relationship. The instant case involves a pure tort, negligence ("an entire want of care which would raise a presumption of conscious indifference to the consequences"). Petitioner submits that this is a significant difference.
>
> In addition, the *Pacific Mutual* case apparently challenges Alabama common law. The instant case involves a vague Georgia statutory enactment, O.C.G.A. § 51-12-5, which was a codification of Georgia's common law.

There is at least one other pending petition for writ of certiorari which involves punitive damages, *Reserve Life Insurance Company v. Eichenseer*, No. 89-1303, filed February 13, 1990. That petition makes excellent arguments as to why the Court should grant certiorari in these punitive damages cases. *Reserve Life*, however, presents a factual and procedural background distinct from the instant case. In *Reserve Life*, the Fifth Circuit Court of Appeals assumed "arguendo that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties" (No. 89-1303 at 22a). Furthermore, the District Court explained in its order

imposing an award of $500,000 in punitive damages why such damages were being assessed, as well as how the amount had been calculated (No. 89-1303 at 23a-26b).

WHEREFORE, petitioner moves and urges the Court to grant its petition for writ of certiorari, alone, or joined with Pacific Mutual's petition in Case No. 89-1279, or joined with that case and Reserve Life's petition in Case No. 89-1303.

March 19, 1990

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MAR 12 1991
OFFICE OF THE CLERK

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This case is pending on Petition for Writ of Certiorari and this Supplemental Brief is based upon a new decision not previously available, *Pacific Mutual Life Insurance Co. v. Haslip,* U.S. (59 USLW 4157, decided March 4, 1991).*

* For compliance with Rule 29.1 see petition for Writ of Certiorari, p.ii.

In *Haslip*, Chief Justice Rehnquist and all Justices except Justice Scalia (concurring) and Justice Souter (not participating) agreed that in order to satisfy the requirement of due process a punitive damage award must bear an understandable or reasonable relationship to compensatory damages. (No such relationship is required in Georgia and no such relationship exists in this case.)

In the majority opinion in *Haslip, supra*, authored by Justice Blackmun and joined by Chief Justice Rehnquist and Justices White, Marshall and Stevens, heavy emphasis was given, inter alia, to appellate court review of punitive damage awards, including particularly their relationship to compensatory damages. The majority found, approvingly, that the Alabama Supreme Court had applied the factors it set forth in *Green Oil Co. v. Hornsby,* 539 So.2d 218, 223 (1989) (59 USLW 4162). The first of those factors is that there must be a reasonable relationship between harm and punitive damages. To emphasize the importance of this first factor, the majority opinion in *Haslip* states that "The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable *relationship to compensatory damages.*" (59 USLW 4162, italics added).

In his concurring opinion, Justice Kennedy found that "A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case." Justice Kennedy went on to favor the comparison of punitive damages and actual damages to the exclusion of other factors relied upon by the majority (59 USLW 4168).

In the dissent, Justice O'Connor relied upon the fact that the jury instructions in *Haslip* "did not suggest what relation, if any, should exist between the harm caused and the size of the award . . . " (59 USLW 4169) and urged

that the "Green Oil factors" should be given in charge to the jury. The first and foremost of those factors, proportionality, was relied upon by the majority and its principle was found to be exclusive by Justice Kennedy.

The Supreme Court of Georgia, in approving the $1,300,000 punitive award in this case, did not apply the trial or applellate review factors found necessary by the majority in *Haslip*. On the contrary, the Supreme Court of Georgia acknowledged that "this award appears to bear no rational relationship to the extent of the injury . . . " (A-5), saying that lack of such rational relationship was of "no consequence" (A-5), and holding that the "concept of proportionality as a legal limitation on the amount of punitive damages" (A-5) is inapplicable in Georgia when such damages are awarded for deterrence.

Like Justice Kennedy, Georgia says that it recognizes that an "inordinately large deterrence award" may reflect undue passion and prejudice (A-6, fn. 9), but unlike Justice Kennedy and the *Haslip* majority, without the due process proportionality requirement Georgia has no means for determining what is an "inordinately large deterrence award."

In *Green Oil Co. v. Hornsby, supra*, regarding reasonable relationship, the Alabama Supreme Court wrote: "If the actual or likely harm is slight, the [punitive] damages should be relatively small." 539 So.2d at 223 (matter in brackets added). The Georgia Supreme Court could not admit that a comparison should be made between harm and punishment because the patient here received only "slight injuries" (A-5).

Consequently, the plaintiff here sought no actual damages (A-5, fn. 8). Instead, plaintiff was awarded $5,001 in nominal damages against petitioner, but $1,300,000 in punitive damages (A-3). If nominal damages, as opposed to actual damages, are to be compared with punitive damages, the ratio here is over 250 to 1. As the majority noted in *Haslip*, the ratio there (4.2 to 1) "may be close to

the line" (59 USLW 4163). Certainly 250 to 1 is over the line, and $1.3 million in punitive damages for "slight injuries" is clearly erroneous.

Without abandoning the equal protection ground that defendants being punished by criminal fines are afforded more protections than defendants being punished by punitive damages, petitioner respectfully urges that if this Court does not grant plenary review, it should grant the writ and summarily vacate the award of punitive damages in this case, in order to emphasize the importance of the due process requirement of meaningful appellate review of punitive damages.

Respectfully submitted,
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